Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1994

DONALD R. MELLO, and
BARBARA J. MELLO, *Petitioners,*

vs.

JOYCE L. WOODHOUSE, et al., *Respondents.*

On Petition for a Writ of Certiorari
to the
Supreme Court of the State of Nevada

PETITION FOR A WRIT OF CERTIORARI

DONALD R. MELLO and
BARBARA J. MELLO
Pro Se
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Carson City, NV 89701
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1. When does a Nevada Legislator become vested in a pension?

2. Is a Nevada Legislator's vested pension contract protected by Article 1 Section 10 of the United States Constitution?

3. How can the vested pension of a Nevada Legislator be legally reduced?

4. With a provision such as Article 4 Section 33 of the Nevada Constitution, when is a legislator entitled to begin receiving this vested pension?

5. After a Legislator has met all provisions required by the pension, including the purchase of additional years of service, and retired, can his benefits be reduced and his purchase of additional years of service be refunded?

6. Can a state court use the excuse of "public outrage" about the increases in a legislative (public) pension to deny a Nevada Legislator his increased benefits?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Supreme Court of the State of Nevada. The petitioners in this Court are italicized, all others are respondents.

Plaintiffs-Appellants: DONALD R. MELLO and BARBARA J. MELLO

Defendants-Appellees: Joyce L. Woodhouse, Steve Cozine, John A. Caserta, Julius Conigliaro, and O.C. Lee as members of the Public Employees Retirement Board of the State of Nevada; Will Keating, as Executive Officer of the Public Employees Retirement System of the State of Nevada, and the Legislators' Retirement System.

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COURT OPINIONS and RULINGS

Opinions in this case of Mello v. Woodhouse, et. al. have been rendered by the following courts:

1. Nevada Supreme Court, case number 24028, decision filed April 6, 1994.

2. Second Judicial District Court of the State of Nevada in and for the County of Washoe, Case No. CV91-660, Department No. 8, filed October 22, 1992.

3. Second Judicial District Court of the State of nevada in and for the county of Washoe, Case No. CV91-660, Department No. 8, Judgment filed October 22, 1992.

4. Second Judicial District Court of the State of Nevada in and for the County of Washoe, Case No. CV91-660, Department No. 8, Findings of Fact and Conclusions of Law filed October 22, 1992.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC section 1257, "1(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals."

The action of the Nevada Supreme Court in its decision of case number 24028, filed April 6, 1994, has upheld the decision from Washoe District Court, case CV91-660, filed October 22, 1994, which in turn upheld a state law that is repugnant to the U.S. Constitution Article 1 Section 10 the impairment a contract, and the vesting of a pension benefit, an issue that has been ruled upon by this court in Ingersoll-Rand Co. v. McClendon, 498 US 133; Alessi v. Raybestos, 451 US 504, 68 L Ed 2nd 402, 101 S Ct 1895; and Nachman

Corp v. Pension Benefit Guar. Corp., 446 US 359, 64 L Ed 2nd 354, 100 S Ct 1723; thereby allowing this breaching of a contract while denying due process as stated in the Fifth and Fourteenth Amendments of the U.S. Constitution. This ruling also violated ERISA Title II which amended 26 USC 401, 26 USC 411, 26 USC 412, and numerous federal regulations.

STATEMENT OF THE CASE

a. Introduction

Donald R. Mello served in the Nevada Legislature for a total of 26 years, 9 months receiving retirement credits from January 1, 1963 through September 30, 1989. He received payment for 1 and 2/3 months of benefits, then saw his monthly check reduced from $2,648.78 to $422 per month. As an Assemblyman Don Mello served when the Legislative Retirement System (LRS) was created in 1967, allowing retirement credit to all legislators who served prior to that date, with $20 per month for each year of service at age 60, with eight years required for vesting. He was a member of the Assembly in 1975 when benefits were increased to $25 per month for each year of service at age 60, and vesting was changed from 8 to 10 years for all legislators elected after 1975 to

comply with the passage of the Employees Retirement Income Security Act (ERISA) September 2, 1974. Don Mello was elected to the state Senate in November 1982 and began service in the Senate January 1, 1983.

On November 29, 1988, Assemblyman and chairman of Ways and Means Marvin Sedway requested Bill Draft Request (BDR) 23-1522. It was introduced in the Assembly May 19, 1989, by the Ways and Means Committee and became Assembly Bill 820 (AB 820). The bill passed the Assembly by a vote of 42 to 0 on June 15, 1989. It was introduced in the Senate June 16, 1989, and heard by Senate Finance Committee June 19, 1989, where Senator Mello was assigned to handle the bill on the Senate Floor.

AB 820 was passed by the Senate by a vote of 16 Yeas, 4 Nays, and 1 Not Voting. The bill was then transmitted to Governor

Robert Miller who vetoed it June 23, 1989. That same day, within one and one-half hours of the governor's action, the veto was overridden in the Assembly by a second vote of 42 to 0. In the Senate the governor's veto was overridden by the same vote of 16 Yeas, 4 Nays, and 1 Not Voting. AB 820 became law as soon as the Senate overrode the governor's veto.

b. **Nevada Legislature Passed AB 820 Which Vested Additional Rights In Petitioners Pension Plan.**

The changes in the Legislative Retirement System changed vesting rights, purchase of service, age at retirement and computation of benefits; and were contained in Sections 11 through 15 of AB 820.[1]

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[1] **Parts underlined are new, [parts in brackets are deleted].**
Sec. 11. NRS 218.2381 is hereby amended to read as follows:

218.2381 1. Any member of the legislator's retirement system may purchase all previous creditable service performed in the legislature if [such] that service was performed [prior] before the creation of this system. The director of the legislative counsel bureau must certify the inclusive date of service of the legislator to validate the service. The legislator must [pay the board's actuary for a computation of costs and] pay the full cost as determined by the actuary.

2. [Any legislator may purchase credit for any period of service for which contributions were not paid while the legislator was receiving temporary total disability benefits for an industrial injury, if the injury was sustained in the performance of his legislative duties for which contributions were required. The legislator must pay the board's actuary for any necessary computation, and must also pay the full actuarial costs determined by the actuary.

3.] Any legislator who has 5 years of contributing creditable service may purchase up to 5 years of [out-of-state service performed with any federal, state, county or municipal agency if that service is no longer creditable in another public retirement system. To validate such service, the legislator must obtain a certification of the inclusive dates of previous service performed with the other public agency, together with certification from that agency that his credit is no longer creditable in another public retirement system. Upon application to retire, the board shall ascertain whether or

not the purchased service has been reestablished in any other public retirement system. The legislator must pay the board's actuary for computations and pay the full actuarial cost as determined by the actuary. For the purposes of this subsection, the federal old-age and survivor's insurance system is not a 'public retirement system."

4. Any legislator who has at least 5 years of contributing creditable service may purchase up to 5 years of military service regardless of when served if such service is no longer credited in the military retirement system. To validate military service, the legislator must provide certification of the inclusive dates of active military service performed, pay the board's actuary for the computation and pay the full actuarial cost as determined by the actuary.

5. Any contributing legislator may purchase previous service performed for any public employer which is not already credited in the legislator's retirement system, including service as an elected officer or a person appointed to an elective office for an unexpired term. The former public employer must certify the inclusive dates of employment and number of hours regularly worked by the legislator to validate such service. The legislator must pay the board's actuary for a computation of cost and pay the full cost as determined by the actuary.] additional service credit.

Sec. 12. NRS 218.2385 is hereby amended to read as follows:

218.2385 1. A legislator who provides proper documentation and establishes the right to purchase [any of the service listed

in] previous creditable service or the right to purchase additional service credit pursuant to NRS 218.2381 may defer payment until actual retirement. Under this subsection, the purchase of service must be based on the full actuarial cost based upon the age of the member at the time of purchase. Service purchased under this subsection may not be credited until retirement. This service can be used for service retirement eligibility.

2. The legislative commission may pay any portion of the cost to validate service under NRS 218.2381, but is not required to do so. No credit may be validated unless both the employer and the employee contributions have been paid.

3. The legislator or legislative commission, or both, purchasing credit under NRS 218.2381 shall pay the full current administrative fees for each month of service purchased.

Sec. 13. NRS 218.2387 is hereby amended to read as follows:

1. Deduct from the compensation of each legislator an amount equal to [15] 20 percent of the gross compensation earned by each legislator and transmit that amount to the board together with the necessary forms prescribed by the board at intervals designated by the board; and

2. Pay to the board from the legislative fund an amount as the contribution of the State of Nevada as employer which is actuarially determined to be sufficient to provide the system with enough money to pay all benefits for which the system will be liable.

Sec. 14. NRS 218.2388 is hereby amended

to read as follows:

218.2388 1. The minimum requirements for retirement is 10 years of accredited service. A lapse in service as a legislator does not operate to forfeit any retirement rights accrued before the lapse.

2. A legislator who meets [this] the minimum requirement of subsection 1 may retire:

(a) At the age of 60 years or older with a full allowance.

(b) At any age less than 60 years with an allowance or benefit actuarially reduced to the age of 60 years. An allowance or benefit under this paragraph must be reduced by [6] 4 percent of the unmodified amount for each full year that the member is under the age of 60 years, and an additional [0.5] 0.33 percent for each additional month that the member is under the age of 60 years. Any option selected must be reduced by an amount proportionate to the reduction provided in this subsection for the unmodified allowance or benefit. The board may adjust the actuarial reduction based upon the experience study of the system and recommendation by the actuary.

3. A legislator may retire with a full allowance at any age if he has at least 30 years of service.

Sec. 15. NRS 218.239 is hereby amended to read as follows:

218.239 1. A legislator entering into retirement [on or after July 1, 1975,] is entitled to receive a monthly retirement allowance of [$25]:

(a) Twenty five dollars for each year of service up to 30 years, prorated for fractions of a year[.] or

From the time the Nevada LRS pension increase was passed Leola Armstrong, executive director of Common Cause, began issuing press statements about her organization beginning a petition drive to repeal the legislative pension increase, although no one from Common Cause appeared at either Way and Means or Senate Finance to oppose the increase.

Sometime later Senator Mello happened to talk with Will Keating, executive officer of the Nevada Public Employees Retirement System (PERS), and administrator of LRS about the possibility

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(b) An amount determined by multiplying the average compensation of the legislator by 3.55 percent for each year of service up to 30 years, prorated for fractions of a year, whichever is greater.

2. For the purposes of this section, the average compensation of a legislator is determined by multiplying the daily rate of pay provided for a majority of the members of the legislature in which the legislator served before his retirement by 260 and then dividing that total by 12.

of the success of the Common Cause petition and what effect it would have on him if he retired shortly. Keating told Mello he would have no problem receiving the increased pension benefits, although he may have to sue on the grounds of 1) breach of contract, 2)detrimental reliance, and 3) loss of a property right.

Shortly after that conversation, Mello attended the National Conference of State Legislators (NCSL) in Tulsa, OK. Two of the speakers were pension authorities, and they told all the Nevadans who attended that portion of the program (Assembly Speaker Joe Dini, Senator Mello, and Gary Crews, legislative auditor) that anyone who served while the increased benefits were in effect would not lose them based on federal law and ERISA Title II; and the Common Cause petition, if passed, would only affect new

legislators who were elected after the petition was approved by the voters at the November 1990 general election.

Upon his return to Nevada, Senator Mello questioned legislative leadership about the possibility of a special session, and was told the governor had no intention of calling one.

c. **The Governor Confirmed The Propriety Of AB 820.**

On August 29, 1989, Governor Miller appeared on Reno television stations as part of a news conference and stated that he "would not call a special session of the Legislature to repeal the legislative pension or for any other matter." This same statement was repeated in the Reno Gazette-Journal newspaper and Carson City Nevada Appeal on August 30, 1989. During the next month Senator Mello twice spoke with the governor's chief of staff and

each time asked if the governor was going to call a special session of the legislature to repeal the LRS pension increase, or for any other reason, and was told definitely "No." Since he did not plan to run for reelection in 1990, Mello felt assured that his work in the legislature was done.

Mello then began plans to retire from the Legislature and from his full-time position as a conductor for the Southern Pacific Transportation Company through means of a company buy out of his seniority and position.

d. **Mello Detrimentally Relies Upon Statements Of State Officials Concerning The Propriety of AB 820.**

During August 1989, Mello requested two retirement estimates concerning his legislative retirement. The first was for retirement in September 1990 and purchase

of all time necessary for the full 30 years of credit. The second request was made after returning from NCSL in Tulsa, OK, and was for a retirement date of September 30, 1989, with purchase of service to accumulate 30 years of credit, and a reduction of benefits to allow Mrs. Mello to receive the same benefit if he should predecease her.

After receiving the formal information necessary to purchase service credit for 30 years for $38,447.37, Mello applied to his bank, First Interstate Bank of Nevada, for a remortgage of his house in Sparks, Nevada, and purchased land to build a retirement home. As soon as the check for the new mortgage on their Sparks home was ready, Senator Mello proceeded to tender his resignation from the Legislature to Governor Miller, and complete all the papers with PERS,

including the payment of $38,447.37 for the purchase of three years and three months service credit to allow retirement at any age with 30 years of service. All retirement paperwork was completed September 29, 1989. Approximately October 28, 1989, Senator Mello received his first retirement check for $2,648.78, through automatic bank deposit.

It is not disputed that Mello detrimentally relied upon the statements of legislative leaders, the Governor, and the governor's chief of staff, as well as the passage of the LRS retirement amendments. (Emphasis added.)

e. **AB 820 Is Illegally Repealed.**

In early November 1989, bowing to political pressures from the news media, Governor Miller called a special session of the Legislature to convene November 21, 1989, for one purpose only, the repeal of

Sections 11 through 15 of AB 820, the sections that increased the legislative pension benefit, changed the vesting schedule, and allowed for the purchase of up to 5 additional years of service credit.

At the Special Session, Senator and Mrs. Mello were represented by legal counsel who requested the right to address the members of the legislature about the consequences of repeal of the LRS increased benefits. He and Mrs. Mello were told by the leadership, the Chief Clerk of the Assembly, and Secretary of the Senate that "no one would be allowed to address the members except legislative legal counsel and that no legislators may make statements about the pension until after the vote had been taken." Anyone else who wished to make statements about the repeal of the pension increase could

do so by written statement only, which would be printed in the legislative journals after the special session. When informed by Mello's counsel that this amounted to a lack of due process, all implied it didn't matter, that's the way the special session would be run.

The bill for repeal was handled as an emergency matter with each house meeting as a committee of the whole, addressed by legislative legal counsel only, and only a couple of questions from legislators allowed in each house.

On November 22, 1989, Senator Mello received from PERS a certified letter explaining that his pension benefits were reduced by action of the special session, his monthly payments would be reduced from $2,648.78 per month to $422 per month as of November 22, 1989, and his purchase of service had been canceled, resulting in a

28.5 percent reduction in his pension benefit because he retired prior to age 60. Enclosed in the letter was a check for $39,093.62, the amount of his purchase of service plus interest as directed by the special session. The Mellos never cashed this check and presented it to Judge Forman at their district court trial in Washoe County.

LEGAL ANALYSIS

The Mellos claim that the action of the legislature was illegal based on ERISA, Title II, Subtitle A Participation, Vesting, Funding, Administration, ETC., Part 1 Participation, Vesting, and Funding; Sec 1011, Minimum participation standards, which amended 26 U.S.C. 401[2],

[2]Public Law 93-406 88 STAT 901, page 73, "(c) Application of Participation Standards to Certain Plans.--
"(1) The provisions of this section other than paragraph (2) of this sub-section) shall not apply to--

and Nevada met the requirements of Section 401(a)(3) that was in effect on September 1, 1974; 26 U.S.C. 411(d)(6), vesting and the contract clause, and 26 U.S.C. 412(c)(8).

26 U.S.C. 411(d)(6) states that benefits cannot be forfeited. Therefore, the repeal of the increased benefits was illegal.

26 U.S.C. 412(c)(8) states that a pension can only be reduced retroactively if done within 2 and one-half months of the end of the plan year, following notice to the Secretary of Labor (Treasury) of financial hardship. As stated in the

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(A) a governmental plan (within the meaning of section 414(d), . . .
(2) A plan described in paragraph (1) shall be treated as meeting the requirement of this section, for purposes of section 401(a), if such plan meets the requirement of section 401(a)(3) as in effect on the day before the date of the enactment of this section.

Nevada Constitution,

"Article 9 Section 1. **Fiscal Year.** The fiscal year shall commence on the first day of July each year."

This is the operating period (year) for all government in Nevada.

The repeal of the increased benefits for legislators was enacted November 21, 1989, 4 months and 21 days after the end of the plan year, no notice was sent to the Secretary of Treasury requesting permission for such action, and no financial hardship existed at the time of the passage or illegal repeal to justify the action of the special session of the legislature.

In Betts v. Bd of Administration of Public Emp., App. 143 Cal.Rptr. 87, the California Supreme Court states:

"II [6-11] It is legally

unquestioned that by virtue of his employment as a public employee, petitioner had a vested contractual right to a retirement pension as authorized by statute. That right is protected by constitution prohibitions against state interference with vested contractual obligations. However, such a right is not rigidly fixed by the terms of legislation in effect during the period in which the public employee serves. The pension regulating statutory language is subject to an implied qualification that the Legislature may make modifications and changes in its retirement system. "'The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension . . [H]e has a vested right to a pension but . . . the amount, terms and conditions of the benefits may be altered.' (Kerns v. City of Long Beach, supra, 29 Cal.2d [848] at p. 855, 179 P.2d [799] at p. 803)

"Reasonable modifications of benefits may be made prior to retirement in order to maintain the flexibility necessary to adjust to changing conditions while insuring the integrity of the system. . . . It is for the court to determine on the facts of each case what constitutes a reasonable and therefore permissible modification."

(Frank v. Board of Administration (1976) 56 Cal.App.3rd 236, 243, 128 Cal.Rptr. 378, 383.) "To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, . . ." (Allen v. City of Long Beach (1955) 45 Cal.2d 128, 131, 287 P.2d 765, 767.)

"In testing the reasonable relation of the 1974 modification to the purpose of the retirement system, a balancing test must be applied to determine whether any disadvantages to members of the system are offset by comparable new advantages." (Stork v. State of California (1976) 62 Cal.App 3d 465, 468, 133 Cal.Rptr. 207.)

"The underlying and fundamental basis for application of a balancing test is the necessity to ascertain the effect of the modification on the reasonable expectations of the public employee for a reasonable retirement pension benefit. Upon the facts presented, the basic fundamental expectation which petitioner could indulge during his tenure in office was that a retirement benefit would be provided based upon either his highest salary received, $21, 499 per annum, or upon the $25,000 salary authorized for the office of treasurer in 1964 which he was precluded from receiving by virtue of the constitutional

prohibition against an incumbent receiving a salary raise during his then current term. (Cal.Const., art. V, sec. 12; Gov.Code, sec. 9360.9). Those expectations were reasonable as they were predicated upon existing factors known to him, and the administrators of the legislators' retirement law.

"At the time petitioner left office he remained a member of the Legislators' Retirement Fund; his only realistic pension expectancy was predicated upon then known salary factors and that he would receive a retirement pension computed on the basis of either the highest salary authorized for the office during his term plus any future pension benefit fluctuations caused by cost of living increases."

The same reasoning should apply to Nevada legislators.

f. **When Does A Nevada Legislator Receive The Increased Pension Benefits That Were Approved During His Term Of Office?**

The Nevada Supreme Court erred by not recognizing Mello's vested benefit under Federal Law. In their decision they say,

"In ruling against Mello, the

district court held that Mello had not acquired a vested right to pension benefits during the period between June 23, 1989, when AB 820 was enacted, and November 21, 1989, when it was repealed, because Mello's term of office had not yet expired. . . . We agree. Legislators are a special class of individuals, They have special rights, responsibilities, and in this case, a special limitation against the vesting of increased pension benefits during their natural term of office. Since the Nevada Legislature repealed AB 820 before the natural expiration of Mello's term of office, his increased pension benefits did not vest. Consequently there has been no impairment of vested contract rights."

However, ERISA , supra, says at Sec. 1011, Sec. 410, (2)(C), page 899.

Hours of Service.-- For purposes of this subsection, the term 'hour of service' means a time of service determined under regulations prescribed by the Secretary of Labor."

This regulation is also at 26 CFR sec. 1.410(a)-5(a) year of service which refers

to 29 CFR part 2530, subpart 200b-2-Hour of service,

> "(a) General rule. An hour of service which must, as a minimum, be counted for the purposes a year of service, a year of participation for benefit accrual, a bread in service and employment commencement date (or reemployment commencement date) under sections 202, 203 and 204 of the Act and sections 410 and 411 of the Code, is an hour of service."

Since Mello did not resign until September 30, 1989, and attended meetings as a state Senator and received compensation for attending those meetings, he met the required one hour of service to vest in the increased pension benefits, after the end of the legislative session.

If, because of the newly created concern of article 4, section 33 of the Nevada Constitution, following repeal of the increased legislative benefits, that petitioner Mello cannot receive the

increased benefits upon resignation from office, then he should receive these vested benefits at the end of his natural term, January, 1991. (Emphasis added.)

g. As To The Question, "Can Public Outrage Justify The Repeal Of Increased Legislative Pension Benefits, The Answer Is No.

In spite of the Nevada Supreme Court and Washoe District Court giving credit to Leola Armstrong and Common Cause for their actions to repeal the increased legislative benefits, the petition was flawed.

Nev. Const. Article 19 outlines the procedure for proposing a referendum for approval or disapproval of a statute or resolution enacted by the legislature. Section 1 of article 19 provides that

> "each referendum petition shall include the full text of the measure proposed." (Emphasis

added.)

In the case of the proposed referendum concerning sections 11 to 15, inclusive, of AB 820, the "full text of the measure proposed" is the actual text of sections 11 to 15 inclusive.

Rather than including those provisions, the petitions merely made reference to those sections and the chapter of Statutes of Nevada 1989 in which they can be found. The purpose of the requirement that the petition set forth the "full text of the measure proposed" is to ensure that the person who signs such a petition knows what he or she is signing, and no one can be expected to know the text of what was referred to as sections 11 to 15 inclusive. At no time has Leola Armstrong shown the petitions which she claims contain thousands of

signatures to the news media or the court. She only claims to have that many signatures on these flawed petitions.

See Legislature of State of Cal. v. Eu, 286 Cal.Rptr.283 (Cal. 1991) where the California Supreme Court stated

> "[6] We are mindful of the fact that ballot measure opponents frequently overstates the adverse effects of the challenged measure, and that their "fears and doubts" are not highly authoritative in construing the measure. (DeBartolo Corp. v. Fla. Gulf Coast Trades Council (1988) 485 U.S. 568, 585, 108 S. Ct. 1391, 1402, 99 L.Ed.2nd 645.)"

In the 1990 California general election a referendum on the ballot setting term limits and various restrictions on state legislators, including abolishing the legislative pension system, was decided in the California Supreme Court re Legislature of State of Cal. v. Eu, 286 Cal.Rptr. 287,

305, 307 states :

> "As will appear, we conclude that although the pension restrictions of Proposition 140 are invalid as to incumbent legislators, the measure is constitutionally valid in all other respects. . . . Petitioners (joined by respondent PERS) argue that when incumbent legislators first assumed office, they were impliedly promised pension benefits substantially equivalent to those offered by the then-existing provisions of the LRS, and that these benefits involved both the primary right to receive any vested pension benefits upon retirements (see City of Long Beach v. Allen supra) as well as the collateral right to earn future pension benefits through continued service, on terms substantially equivalent to those then offered (Carman v. Alvord (1982) 31 Cal.3d 318, 325, 182 Cal.Rptr. 506, 644 P.2d 192). [U]pon acceptance of public employment plaintiff acquired a vested right to a pension based on the system then in effect. That system allowed him to earn successively higher levels of benefits based on his years of service. . . (Olson v. Cory, 27 Cal.3d at p. 541, 178 Cal.Rptr. 568, 636 P.2d 532.) [17] In response to petitioners' assertions, respondent Eu and intervener first contend that incumbent

legislators do no have a vested right under the LRS to continue to accrue pension benefits through continued service. In this regard, they suggest that article IV, section 4, of the state Constitution precludes legislators from acquiring any vested right to continue to earn pension benefits. We disagree. . . . nonetheless on commencing to serve the state the officer thereupon acquires a vested right to earn, through continued service, additional pension benefits in an amount reasonably comparable to those available when he or she first took office. According to petitioners, that right is not extinguished when one term of office ends and another commences. (see In re Marriage of Alarcon (1983) 149 Cal.App.3d 544, 552-553, 196 Cal.Rptr. 887.) To hold otherwise, petitioners argue, could unduly penalize public officers who serve elective or appointive terms.

"We agree with petitioners. It would be anomalous to hold that a legislator's supposedly "vested" right to acquire a reasonable pension is subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office (assuming no right to receive actual benefits has yet accrued). Under such a holding, a legislator could

> entirely lose future benefits on the very eve of entitlement thereto.
>
> "The state, in adopting the LRS, elected to treat legislators in a manner similar to other state employees, providing them with a plan whereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits." (Emphasis added.)

The State of Nevada in district court tried to argue that a legislators term in office began anew after each election and vested rights did not accrue, as opposed to the ruling of the California Supreme Court in Legislature v Eu supra.

h. The Repeal Of AB 820, Sections 11 Through 15 Was Illegal.

ERISA, Title II in 26 U.S.C. 412(c)(8) states clearly how a retroactive amendment to a pension can be adopted and under what circumstance.

26 U.S.C. 412(c)(8) Certain retroactive plan amendments.--For purposes of this section, any amendment applying to a plan year which--

(A) is adopted after the close of such plan year but no later than 2 and one-half months after the close of the plan year . . .

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances.

Shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary of Labor[3] notifying him of such amendment and the Secretary of Labor has approved such amendment. No amendment described in this subsection shall be approved by the Secretary of Labor unless he determines that such amend is necessary because of a substantial

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[3]A later amendment to ERISA determines such amendments will be handled through the office of the Secretary of Treasury.

business hardship (as determined under subsection (d)(2) and that a waiver under subsection (d)(1) is unavailable or inadequate. (Emphasis added.)

The 1989 Special Session of the Legislature was held November 21, 1989, 4 months and 21 days after the beginning of the plan year, not within the allowed 2 and one-half months stated in 26 U.S.C. 412(c)(8). Governments and agencies in Nevada clearly operate on a fiscal year beginning July 1 of each year as required by the Nevada Constitution Article 9 Section 1. Additionally, there is no evidence that notification was made to either the Secretary of Labor or the Secretary of the Treasury and there has been no evidence of any substantial business hardship at the time of repeal. (Emphasis added.) The Special Session was called for one reason only, to save the

political future of the Assembly Democratic leadership who desired to maintain control of the Assembly.

i. <u>The State Of Nevada Has Taken Inconsistent Positions For Political Reasons.</u>

The constitutional restriction, Article 4, Section 33 on increases of legislative compensation was ratified by the people of Nevada at the 1958 general election.[4] A similar constitutional restriction, Article 6, Section 15, on increases in judicial compensation was ratified by the people of Nevada at the

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[4]Nev. Const. Art. 4 Sec 33. Compensation of members of the legislature;. . . . The members of the Legislature shall receive for their services, a compensation to be fixed by law and paid out of the public treasury, for not to exceed 60 days during any regular session of the legislature and not to exceed 20 days during any special session convened by the governor; . . .

1968 general election.[5] Yet administrators of both the Public Employees Retirement System and the Nevada Judicial Retirement program have seen fit to ignore these constitutional limitations on increases in benefits, including pension benefits, when a legislator or judge retires.[6]

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[5]**Nev. Const. Article 6, Sec. 15. Compensation of Judges.** The Justices of the Supreme Court and District Judges shall each receive for their services a compensation to be fixed by law and paid in the manner provided by law, which shall not be increased or diminished during the term for which they shall have been elected, unless a Vacancy occurs, . . .

[6]Legislators who received benefits immediately upon retirement were James Bailey, December 1967 (after creation of the LRS), James Banner, September 1, 1989, and Senator Donald R. Mello, September 30, 1989, both retiring and receiving the benefits increased by AB 820.

Seven judges who retired before the end of their terms and

Long time disregard of Nev. Const. Art. 4 sec. 33 has been going on with legislators by paying them for attending various meetings when the legislature is not in session per NRS 218.223 section 1.

> **218.223 Compensation of legislator for attending presession orientation conference or representing state when legislature not in session; . . .**
>
> 1. Except as otherwise provided in subsections 2 and 4, each senator and assemblyman is entitled to receive the compensation provided for a majority of the members of the legislature during the first 60 days of the preceding session, . . . for each day of attendance at a presession orientation conference or

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received increased pension benefits were: Supreme Court Justices David Zenoff, end of term 12/31/79, retired 4/30/77 and Jon Collins, end of term 12/31/79, retired 1/4/77. District Court judges: Roscoe H. Wilkes retired 11/30/73, end of term 1/5/75; William P. Beko retired 10/15/89, end of term 1/6/89; James A. Brennan retired 5/20/91, end of term 1/6/91; James J. Guinan retired 7/3/89, end of term 1/6/91; Michael J. Wendell retired 9/7/91, end of term 1/5/97.

at a conference, meeting seminar or other gathering at which he officially represents the State of Nevada or its legislature.

These payments of daily salary for attending various meetings have cost the taxpayers thousands of dollars each year while the members of the Legislature ignore the restriction on compensation mandated by the Nevada Constitution Article 4 section 33.

Many Nevada Supreme Court and district court judges receive additional compensation during their terms of office in violation of Article 6 section 15 which states:

> Sec: 15. **Compensation of judges.** The Justices of the Supreme Court and District Judges shall each receive for their services a compensation to be fixed by law and paid in the manner provided by law, which shall not be increased or diminished during the term for which they shall have been elected. . . . . (Emphasis added.)

Per Chapter 288 (Senate Bill 305)

58th Session , 1975

Section 1. Nrs. 2.060 is hereby amended to read as follows: . . . (subsection) 3. Any justice of the supreme court who qualifies for a pension under the provision of subsection 2 is entitled to receive for each year served beyond 12 years up to a maximum of 20 years, an additional 4.1666 percent of the sum received as salary for his judicial services during the last year thereof, payable as provided in subsection 2. . .

Sec. 2. NRS. 3.090 is hereby amended to read as follows . . . (subsection) 3. Any judge of the district court who qualifies for a pension under the provisions of subsection 2 is entitled to receive for each year served beyond 12 years up to a maximum of 20 years, an additional 4.1666 percent of the sum received as salary for his judicial services during the last year thereof, payable as provided in subsection 2.

This allowable increase in a judges salary for the last year of service, which increases his pension benefit upon retirement, is in violation of Nev. Const. Art. 6, sec. 15. An attempt to learn the number of judges who retired with this

additional compensation was stopped by a protective order obtained by the Administrative Office of the Courts, even though this is considered public record. Additionally, numerous judges are appointed to various committees such as law library boards, Judicial Commission, and the Pardons Board, as a means of giving them additional compensation when the legislature fails to pass an increase in compensation before an election, and when a Supreme Court Justice, whose terms are staggered, can not receive a salary increase because it would occur during his term of office, thus bringing his level of compensation equal to newly elected justices, by giving him an increase in compensation.

The increase in pension benefits for legislators, as approved in AB 820, was done in good faith to make up for the lack

of any increases, cost of living or otherwise, in the benefits since 1975. The change in the manner of calculating benefits to a percentage of salary was included to bring the LRS into line with the manner of calculating benefits by a percentage of salary as is done for Nevada Supreme and district court judges and all other elected officials and public employees who are members of the Nevada Public Employees Retirement System and the Judicial Retirement plan.

j. CONCLUSION.

By custom and practice Nevada pension administrators have recognized that the end of the elected officials term of office is upon resignation or death, as well as the natural calendar expiration of a term, a custom used not once but numerous times. (Emphasis added.) The claim that Mello cannot receive his

benefits because of Article 4 section 33 of the Nevada Constitution has arisen this one time only because of politics, and for no other reason.

The legislature attempted to return to the good graces of the voters through its political action of repealing the increased benefits for legislators, but even that didn't work, as illegal as it was, because at the next election some 25 percent of the members of the Legislature were replaced in the next election.

To date, Nevada courts at all levels and Nevada pension administrators have chosen to ignore federal law as it applies to Nevada government pensions, except for the pension limits set in 26 USC 415, and the use of those limits for repeal of the additional benefits for legislators.

Concerns about Nevada's violation of 26 USC 411 (d)(6) were first expressed

during district court trial by Mrs. Mello, as evidenced in the trial transcript page 718, dated June 18, 1992, regarding a conversation she had with the Mellos' tax attorney, Kevin Mirch; "According to Federal law, you can't do this. There's two sections of the IRS code that you can't do this (repeal benefits). There's 411-D-6 and 412-C-8."

Regarding 26 USC 412 (c)(8) this was first brought to the attention of the Washoe District Court in the REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT, page 33, footnote 3, filed with Washoe District Court April 26, 1991:

> "As a side note, despite the State of Nevada's repeal of those sections and its impairment of plaintiffs' contract rights, it should be pointed out that there exists grave doubt as to whether or not the Legislators' Retirement System constitutes a "qualified" pension plan within

> the meaning of the Internal Revenue Code. Undoubtedly, the Nevada Legislature's enactment of Sections 11 through 15, inclusive, of Chapter 481, Statutes of Nevada 1989, increased the pension benefits to which a legislator was entitled upon retirement. By Chapter 1, Statutes of Nevada, Special Session 1989, the Nevada Legislature repealed the earlier legislation, thereby effecting a reduction in the pension benefits which had theretofore been allowed by law. Federal law provides that, where there is a reduction in pension benefits under a plan, in order for that plan to maintain its qualified status, certain steps must be taken. Internal Revenue Code section 412(C)(8). The necessary steps were, to the knowledge of plaintiffs Mello, not followed. Consequently, as it now stands, the Legislators' Retirement System is not a "qualified" plan under Section 415 of the Internal Revenue Code." (Emphasis added.)

Judge Forman, in making his decision of the case in Washoe District Court, chose to ignore any reference to federal law.

The discussion of the Employees

Retirement Income Security Act and the changes it made in federal law continued in the Nevada Supreme Court with the filing of plaintiffs opening brief, page 13, filed May 20, 1993;

> "Issue No. 1: Whether or not the Nevada Legislature's enactment of Chapter 1, Statutes of Nevada Special Session 1989 impaired vested contract rights of Appellants in violation of Article 1, Section 10 of the United States Constitution. Answer: Yes.
>
> "Subissue No. 1: Whether or not the enactment of Chapter 1, Statutes of Nevada Special Session 1989, was in violation of the Employee Retirement Income Security Act of 1974? Answer Yes.

Raising of the issue of ERISA and the changes it made to federal law continued with the filing of appellants' reply brief, July 22, 1993, pages 5-7;

> "II
> ERISA PRECLUDED THE RETROACTIVE REPEAL OF SECTIONS 11 THROUGH 15, INCLUSIVE, OF CHAPTER 481,

"Appellants' argument, concerning the application of federal law to this case is not, as Respondents argue, the classical "red herring." Federal law, specifically ERISA, precluded Respondents from effecting the retroactive appeal of those pension benefits enacted by Sections 11 through 15, inclusive, of Chapter 481, Statutes of Nevada 1989. Under ERISA, a qualified plan such as that plan operated by the Public Employees Retirement Systems of Nevada could have effected an amendment (i.e., the repeal of Sections 11 through 15, inclusive, of Chapter 481, Statutes of Nevada 1989) of its plan so as to bring it into compliance with the limits set by 26 U.S.C. 415(b). In order to be considered retroactive, however, such an amendment must necessarily have been made within three and one-half months after the end of the plan year. See, 26 U.S.C. 412(c)(8). In the case of the State of Nevada and its Public Employees Retirement System, the end of its plan year is June 30. By reason of Article 9, Section 2 of the Nevada Constitution, the State of Nevada operates on a fiscal year of July 1 through June 30, thereby setting the plan year for the Public Employees Retirement

> System. Consequently, in order for the Public Employees Retirement System to make a valid and retroactive amendment of one of the provisions of its plan for the year July 1, 1988, through June 30, 1989, that amendment would have to be accomplished by September 15, 1989, i.e., within three and one-half months after the end of its plan year. Considering that the provisions of Sections 11 through 15, inclusive, of Chapter 481, Statutes of Nevada 1989, were part of the Public Employees Retirement System's plan for its July 1, 1988 through June 30, 1989 year (i.e., Chapter 481 had been enacted on June 23, 1989), this attempt on the part of the Nevada Legislature to retroactively amend the pension plan of the Public Employees Retirement System was too late to be effectual."

The Nevada Supreme Court, in making its ruling, also chose to ignore all references to federal law.

The State of Nevada will claim that Title I of ERISA does not apply to the LRS and is being used as a "red herring." Yet the "so called official" reason for

calling the 1989 special session was because of newspaper reports that the pension benefit increases granted under AB 820 supposedly exceed 26 U.S.C. 415 benefit limits, and could cause the LRS to lose its tax exempt status which would cost the State of Nevada and pension recipients additional taxes. If Respondents had bothered to actually read ERISA, Title II clearly amends the Internal Revenue Code, and includes references of applying to government plans that were in effect the day before passage of ERISA, September 1, 1974, and the Nevada LRS and PERS were in existence on that date and complied with the IRC of 1954 as required by ERISA, "sec.1011, (c) Application of participation standards to certain plans.--"(1), (A) and (2).

At no time during the special session were legislators told about the need to

comply with ERISA or the allowing of a "grandfather" provision to protect the vested benefits of retirees. This information was not revealed to members of the Legislature until the 1991 session when, with the introduction of AB 701, the "grandfather" language was included in both LRS and PERS statutes to protect the funds from loss of tax-exempt status, to avoid breach of contract with members of these funds who may earn benefits in excess of the 26 U.S.C. 415 limits and avoid taxation of proceeds of these funds. AB 701 did not become law until July 5, 1991, five days after the time designated by Congress for such action. (Emphasis added.)

At no time during the 1989 Special Session were legislators informed about the possibility of establishing a legal second pension fund, that would prevent

the subsequent breach of contract for Mello and others, could be paid as direct appropriation to the LRS, and allow these excess benefits to be taxed.

The current administrator of both PERS and LRS has shown total disregard for federal law since taking over his position, thereby breaching his fiduciary responsibility by not informing the Legislature of the need to comply with ERISA Title II and subsequent amendments of this law; not telling the legislature of the 415 limits before the passage of AB 820, and by failing to inform either the members of the 1989 regular or special sessions of the allowable "grandfather" provision to protect all pension benefits vested thereby avoiding subsequent breach of contract of Mello and others. Will Keating admitted in his deposition of May 6, 1992, pages 74 through 78, taken at

Reno, Nevada, and entered into evidence at the Mellos trial in Washoe District Court, that he had concern about the LRS not complying with more than one section of the Internal Revenue Code as early as 1986, but there is no evidence he ever expressed this concern to anyone with the Legislature, and did not bring up this concern when discussing AB 820 with Assembly Ways and Means or Senate Finance committees. (Emphasis added.) As a result of his failures to keep informed the necessary people who govern the funds, the State of Nevada faces not just this case but several others that will cost the taxpayers of Nevada thousands of dollars in legal fees and awards; as well as the possibility of fines from the Internal Revenue Service and loss of the fund's tax exempt status.

This petition for a writ of

certiorari is filed following a request for an extension of time that was granted by Justice Sandra Day O'Connor on July 5, 1994, allowing an additional 30 days to prepare the petition.

REASONS FOR GRANTING THE WRIT

1. Repeal of sections 11 through 15 of AB 820 were illegal because they voided a contract in violation of Article 1 section 10 of the U.S. Constitution.

2. Repeal of sections 11 through 15 of AB 820 were illegal and in violation of 26 U.S.C. 412 (c)(8).

3. Repeal of sections 11 through 15 of AB 820 was illegal because it destroyed vested rights of Senator Donald Mello, retired, by violating 26 U.S.C. 411 (d)(6).

4. Repeal of sections 11 through 15 of AB 820 was discriminatory under 26 U.S.C. 401, 1954 Internal Revenue Code, because

Senator Mello's vested rights were not protected by the "grandfather" provision allowed by Congress and that was passed by the Nevada Legislature and became law July 5, 1991, after Senator Mello's vested rights had been illegally repealed.

5. Senator and Mrs. Mello were denied due process by the Nevada Legislature when they were not allowed to speak to that body during the Special Session of 1989, when sections 11 through 15 of AB 820 were repealed illegally.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DONALD R. MELLO and
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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD R. MELLO AND BARBARA JANE MELLO, Appellants, vs. JOYCE L. WOODHOUSE, STEVE COZINE, JOHN A. CASERTA, JULIUS CONIGLIARO, AND O. C. LEE AS MEMBERS OF THE EMPLOYEES RETIREMENT BOARD OF THE STATE OF NEVADA; WILL KEATING, AS THE EXECUTIVE OFFICER OF THE PUBLIC EMPLOYEES RETIREMENT BOARD OF THE STATE OF NEVADA, AND LEGISATOR'S RETIREMENT SYSTEM, Respondents.	)	No. 24028
	)	FILED Apr 06 1994 Janette M. Bloom, Clerk of Supreme Court, by A. Morgan Deputy Clerk

Appeal from a judgment of the district court dismissing appellants' breach of contract claim and denying appellants' request for declaratory and injunctive relief. Second Judicial District Court, Washoe County; William N. Forman, Judge.

Affirmed.

O P I N I O N

PER CURIAM:

Appellant Donald R. Mello (Mello) served as a member of the Nevada Legislature for nearly twenty-seven years. During the 1989 legislative session, Mello was instrumental in the passage of a law which quadrupled the pension benefit for legislators. Mello resigned as a state legislator about three months later with his retirement benefits based upon the newly enacted legislation. Public outrage against the increased pension benefit led Governor Miller to convene a special session of the Nevada Legislature that repealed the increased pension benefits. Consequently, Mello's pension benefits were drastically reduced. In response, Mello brought claims against respondents

for breach of contract, injunctive and declaratory relief, constitutional violations, and incidental damages. That action challenged the repeal of the law increasing legislators' pension benefits as an unconstitutional impairment of contract. After a bench trial, the district court concluded that the Nevada Constitution prohibited the vesting of Mello's rights to the increased pension during his natural term of office and dismissed the action with prejudice.

FACTS

Donald R. Mello was appointed by the Washoe County Commissioners in December of 1963 to fill a vacancy in the Nevada Assembly. From that date until December 31, 1982, he served continuously as a member of the Nevada Assembly. Mello was elected to the Nevada Senate on November

2, 1982, and he commenced service there on January 1, 1983. He was re-elected on November 4, 1986, and served until his retirement on September 30, 1989.

During the regular 1989 session of the Nevada Legislature, Assembly Bill 820 (AB 820) was introduced to modify provisions of the Legislators' Retirement Law (LRL), found in Nrs 218. AB 820 provided a change in the LRL from a flat retirement calculation of $25.00 per month per year of service, to a scheme based upon a formula using the salary of a legislator as the basis for the calculation of the pension benefit.[1]

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[1] Pursuant to NRS 218.210 each legislator elected on or after November 4, 1986, was entitled to receive $130.00 as compensation for each day of service. The Nevada Constitution limits legislators to 60 days compensation during a regular session and 20 days compensation during a special session of the legislature convened by the governor. Nev. Const., art 4 sec. 33. Consequently, the maximum compensation allowable

989 Nev. Stat., ch.481, sections 11-15 at
023; compare NRS 218,238311 218,238351
18,2387; 218.2388; 218.239. In addition,
B 820 provided that a
egislator could retire at any age if he
ad accumulated thirty years of service

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or a legislator is $10,400.00 for each biennial eriod ($130.00 x 80). Nevertheless, AB 820 set orth a formula whereby the daily compensation of legislator was annualized ($130.00 x 260 days = 33,800.00), resulting in an inflated imaginary ompensation base that was 6.5 time $67,600.00 v 10,400) greater than the actual compensation llowed by the Nevada Constitution and received by n actively serving legislator during a biennial egislative period. The annualized salary was ivided by 12 to get a monthly base salary $2,816.67). The monthly base salary was then ultiplied by a factor (3.55% for each year of ervice in the legislature up to 30 years) to rrive at the monthly pension benefit. Consequently, a legislator with 30 years of ervice would receive a pension benefit of 106.5% of his inflated imaginary annualized salary ($2,816.67 x 106.5% = $2,999.75 per month). In the absence of this legislation, a legislator retiring with 30 years service would receive $750.00 per month (30 x $25.00).

credit.[2] The substantial increase in the formula was in large measure the result of Mello's personal interest, support and participation in the marshalling of votes for the passage of AB 820.

On June 23, 1989, the Nevada Senate passed AB 820 and sent the bill to Governor Miller for his approval. Governor Miller vetoed the bill, but his veto was overridden that same day by the Nevada Legislature. Consequently, AB 820 was enacted into law. 1989 Nev. Stat., ch 481, sec. 1 at 1023. On September 30, 1989, Mello retired.[3] By virtue

[2]AB 820 also contained a provision where a legislator could buy up to five years of service credit.

[3]On the date of his retirement Mello had amassed nearly 27 years of service credit. In addition, Mello purchased several additional years of service credit for $38,447.37, thereby giving him a total of 30 years of service credit.

of this legislation, Mello's pension benefit was increased from $750.00 per month to nearly $3,000.00 per month.

Public outrage against the increased pension benefit for legislators resulted in Leola Armstrong, Executive Director of Common Cause, initiating a petition drive for a referendum on the repeal of AB 820. On October 30, 1989,Nevada's Attorney General issued an opinion which stated that AB 820 violated the Internal Revenue Code.[1]

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[1]The Attorney General's opinion declared that the formula enacted into law in AB 820 violates the maximum benefit limitation contained in 26 U.S.C. section 415 (Internal Revenue Code):
new benefit formula, enacted in 1989, do not comply with provisions of the Internal Revenue Code because these retirement allowances exceed the limitations contained in 26 U.S.C sec. 415 (1983). We reach this conclusion for two reasons. First, the statutory service credit percentage factor is too generous. Second, the statutory definition of "average compensation" used for computing

Shortly thereafter, Governor Miller convened a special session of the legislature. On November 21, 1989, the Nevada Legislature repealed AB 820 and returned to legislators' pension benefit to the levels in effect prior to the passage of AB 820. 1989 Nev. Stat., ch. 1, sec. 1 at 1 (16th Special Session). On the next day, Will Keating, Executive

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a retirement benefit bears insufficient relationship to the "compensation" actually received by legislators, let alone the federal definitions attached to "compensation" and "average compensation" contained in applicable portions of the United States Code and Code of Federal Regulations. This situation could have been avoided had the Legislature employed a balanced approach of making more modest adjustments in their reasonable increases in their actual compensation. As it is, the rather radical adjustments made solely in the retirement plan benefit formula potentially expose the plan's trust fund and the plan's members to certain adverse income tax consequences.

Op. Nev. Att'y Gen. No 89-15, at 106 (Oct. 30, 1989).

Officer of PERS, corresponded with Mello indicating the effects of the repeal of AB 820 on Mello's pension benefit and returning the funds Mello used to purchase the additional years of service credit.[5]

On January 31, 1991, Mello filed an action against respondents for breach of contract, injunctive and declaratory relief, constitutional violations, and incidental damages. That action challenged the repeal of AB 820 as an unconstitutional impairment of contract. On June 15, 1992, a six day non-jury trial began before the district court. The district court concluded that Article 4, sec. 33 of the Nevada Constitution

[5]Because of the repeal of AB 820, Mello was not eligible to retire before age 60. At retirement Mello was 57 months shy of 60 years of age. Consequently, Mello's pension benefit was reduced .5% for each month that he retired prematurely (28.5%).

prohibits a legislator's pension from increasing during his natural term of office; and that the increase to Mello's pension benefits enacted by the Nevada Legislature (AB 820) was repealed before Mello's natural term of office expired on January 1, 1991. Consequently, Mello's contract rights were not impaired.

DISCUSSION

Whether the repeal of AB 820 impaired vested contract rights in violation of the United States and Nevada Constitutions.

Mello contends that two vested contract rights were impaired by the repeal of AB 820:[6] the right to purchase additional years of service credit and the right to receive a pension benefit of

[6]Both of the asserted rights were also created by AB 820.

$2,648.78.[7] Mello contends that these contract rights were valid and legally enforceable and could not be unilaterally abrogated by state legislation without violating Article 1, sec. 10 of the United States Constitution and Article 1, sec. 15 of the Nevada Constitution.[8]

Many cases have been reported that discuss the application of the Contracts Clause of the United States Constitution.

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[7]Although Mello was entitled to a monthly pension benefit of $2,999.70 under AB 820, he opted for a reduced alternative benefit whereby his wife would receive his pension for the rest of her lifetime should Mello predecease her.

[8]Article 1, sec. 10 of the United States Constitution provides, in relevant part:

No State shall . . . make any . . . Law impairing the Obligation of Contracts . . . .

Article 1, sec. 15 of the Nevada Constitution provides, in relevant part:

No . . . law impairing the obligation of contracts shall ever be passed.

See Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) (only in those contracts which the parties have vested interest are the parties afforded protection from impairment); Koch v. Yunich, 533 F.2d 80(2nd Cir. 1976) (the Contracts Clause does not prohibit states from modifying contracts within reason); Morton v. Dardanelle Special School District, 121 F.2d 423 (8th Cir. 1941), cert. denied, 314 U.S. 655, reh'g denied, 314 U.S. 713 (1941) (that which is not an enforceable contract right is not an obligation which can be impaired with in the meaning of the Contracts Clause); Dunseath v. Nevada, 52 Nev. 104, 282 P.879 (1929) (the obligation of a contract cannot properly be said to be impaired by a statute in force when the contract was made).

Article 4, sec. 33 of the Nevada Constitution provides:

The members of the Legislature shall receive for their services, a compensation to be fixed by law and paid out of the public treasury, for not to exceed 60 days during any regular session of the legislature and not to exceed 20 days during any special session convened by the governor; but no increase of such compensation shall take effect during the term for which the members of either house shall have been elected. . . .

(Emphasis added.) In ruling against Mello, the district court held that Mello had not acquired a vested right[9] to

[9]Mello cites to three California cases which hold that the right to pension benefits upon the acceptance of employment. Miller v. State, 557 P.2d 970 (Cal. 1977); Dickey v. Retirement Board, 548 P.2d 548 (Cal. (1976); In re Marriage of Brown, 544 P.2d 561 (Cal. 1976).

pension benefits during the period between June 23, 1989, when AB 820 was enacted, and November 21, 1989, when it was repealed, because Mello's term of office had not yet expired.[10] The district court recognized that pension benefits for legislators are subject to the limited vesting rule set forth in Public Emp. Ret. v. Washoe Co., 96 Nev. 718, 615 P.2d 972

However, these cases are easily distinguishable from the instant case. Here, Mello was elected to the Nevada Senate and not hired as an employee. Moreover, California employees do not have a constitutional restriction against increases in compensation during their employment as do Nevada's legislators.

[10]Mello was elected to his second term in the Senate on November 4, 1986. That term did not expire until January 1, 1991. Respondents concede that if the repeal of AB 820 had come after the expiration of Mello's term, that Mello's increased pension would have vested and would not have been subject to repeal

(1980)[11] The district court also recognized that this rule of vesting must take into consideration the proscription against increases to legislator's compensation during their natural term of office as set forth in Article 4, sec. 33 of the Nevada Constitution. We agree. Legislators are a special class of individuals. They have special rights, responsibilities, and in this case, a special limitation against the vesting of

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[11]In Public Emp. Ret. v. Washoe Co., 96 Nev. 718, 615 P.2d 972 (1980), the Nevada Legislature enacted a law that removed special investigators and university policemen from the definition of police officers thus making them ineligible for early retirement. This court held that prior to absolute vesting, pension rights are subject to reasonable modification, but that the retroactive application of the new law was unreasonable. Id. at 722, 615 P2d at 974. However, unlike the instant case, the employees in Washoe were not subject to a constitutional proscription against the vesting of their pension benefits as are Nevada's legislators.

increased pension benefits during their natural term of office. Since the Nevada Legislature repealed AB 820 before the natural expiration of Mello's term of office, his increased pension benefits did not vest. Consequently, there has been no impairment of vested contract rights.[12]

Whether Mello is entitled to equitable relief based on promissory estoppel.

Mello asks this court to ignore the constitutional restriction of Article 4, sec. 33 and rely on the doctrine of promissory estoppel to provide him relief. Mello contends that he relied on the

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[12]Nonetheless, Mello contends that Article 4, sec. 33 of the Nevada Constitution is inapplicable to his situation because: (1)pension benefits are not drawn from the state treasury; and (2)increased pension benefits do not constitute increased compensation. We conclude that these contentions lack merit.

State's promise of an increased pension benefit to his detriment, and because of that reliance he assumed additional debt to buy extra service credit and purchase real property. In support of this proposition, Mello cites to Nev. Pub. Emp. Ret. Bd. v. Byrne, 96 Nev. 276, 607 P.2d 1351 (1980). In Byrne, PERS mistakenly overestimated Byrne's retirement benefit. This court precluded PERS from reducing Byrne's pension benefit from the amount estimated because Byrne had detrimentally relied on the PERS estimate and incurred substantial debt. In the instant case, PERS made no such mistake. PERS estimated Mello's expected pension benefit based on the passage of the newly enacted AB 820. When AB 820 was repealed on November 21, 1989, PERS had no alternative but to change Mello's pension benefit.

After the passage of AB 820, public outrage against the increased pension benefit for legislators resulted in Leola Armstrong, Executive Director of Common Cause, initiating a petition drive for a referendum to repeal AB 820. Mello was aware that Common Cause was having considerable success in obtaining signatures.[13] In addition, on August 25, 1989, Mello contacted Will Keating, Executive Officer of PERS, to discuss what Mello could do in the event that AB 820 was repealed. Keating suggested that Mello could rely on the doctrine of detrimental reliance, and he an Mello went

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[13] In response to the petition drive for the repeal of AB 820, Mello directed the Legislative Counsel Bureau to investigate Armstrong's tenure as secretary to the Senate to see if there were any improprieties which could be brought to light that could discredit Common Cause's petition drive.

on to discuss the doctrine's application to the repeal of AB 820. It is clear from these events that Mello made a calculated decision to retire, with full knowledge that the repeal of AB 820 was possible. In reference to Mello's claim for promissory estoppel due to detrimental reliance, the district could concluded: Senator Mello was sophisticated lawmaker who took the steps he felt necessary to take advantage of the newly passed amendments to the Legislative Retirement System. These steps constituted a calculated risk which included the act of Senator Mello's retirement. A court should not intervene in a situation where such acts were designed to take advantage of an equitable principal. Calculated reliance is not detrimental reliance. The district court was faced with two

opposing theories concerning Mello's reliance on AB 820. The district court concluded that Mello concocted his reliance on AB 820 in an effort to save the increased pension benefits, and that conclusion is well supported by the record.

Moreover, it is well established that courts of equity can no more disregard statutory and constitutional requirements than can courts of law. INS v. Pangilinan, 486 U.S. 875 (1988); Hedges v. Dixon County, 15 U.S. 182, 192 (1893); see also Walker v. U.S. Dept. of Housing and Urban Dev., 912 F.2d 819 (5th Cir. 1990). Equity cannot change, modify or ignore the restriction of the Nevada Constitution in order to shape a remedy for Mello.

CONCLUSION

For the reasons stated above, there

has been no impairment of vested contract rights by the State of Nevada. Further, Mello is not entitled to equitable relief based on a promissory estoppel theory. Accordingly, the judgment of the district court is affirmed.

_____C.J.
Rose

_____, J.
Steffen

_____, J.
Shearing

_____, D.J.
Bonaventure

APPENDIX B

Case No. CV91-660

Department 8

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE
STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

DECISION

Filed 92 Oct 22 P2:22, Judy Bailey Clerk by M. Lopez

DONALD R. MELLO,
Plaintiff,

vs.

JOYCE L. WOODHOUSE, STEVE COZINE, JOHN A. CASERTA, JULIUS CONIGLIARO, AND O.C. LEE as members of the Public Employees Retirement Board of the State of Nevada; WILL KEATING, as the Executive Officer of the Public Employee's Retirement Board of the State of Nevada, and LEGISLATOR'S RETIREMENT SYSTEM,

Defendants.
_____/

Trial in the above-entitled matter commenced on June 15, 1992 and concluded June 22, 1992. Plaintiffs seek declaratory and injunctive relief and

declaratory and injunctive relief and present various claims for damages. Most of the facts are uncontroverted. As findings of fact, I adopt the undisputed facts in Plaintiffs' Amended Trial Statement on page 2, lines 18 through 28, page 3, lines 1 through 18 and lines 21 through 28, page 4, lines 1 through 27 and the undisputed facts contained in Defendants Trial Statement on page 3, line 18 through 27, page 4, line 1 through 27 and page 5, lines 1 through 17. Additional findings of fact are stated in connection with my discussion of the legal issues.

The enactment and repeal of the 1989 Amendment to the Legislator's Retirement Act raises complex issues of law which are covered in a lengthy but thorough brief filed by plaintiff's counsel. In fairness to the Mellos, I have attempted to read

most of the cases cited by their attorney.

No state may pass a law impairing the obligation of the contract U.S. Const. Art. 1, sec. 10. By rendering services and making contributions, and employee acquires a limited pension right to pension benefits, which may not be eliminated or substantially changed by unilateral action of the government, Public Emp. Ret. v. Washoe Co., 96 Nev. 718, 615 P.2d 972 (1980). Thus, if Chapter 1 Statutes of Nevada Special Session, 1989 impairs vested contract rights of the Mellos, the repeal constitutes a constitutionally impermissible impairment. The State Concedes the existence of these basic rules and relies primarily on Article 4, Section 33 of the Nevada Constitution. The pertinent portion of this section reads as follows:

"The members of the legislature shall

receive for their services a compensation to be fixed by law and paid for out of the public treasury, for not to exceed 60 days during any regular session of the legislature and not to exceed 20 days during any special session of the legislature convened by the governor; but no increase of such compensation shall take effect during the term for which the member of either house shall have been elected."

Despite this constitutional restriction, it is Mello's position that he received vested rights to the increased benefits during his term of office. I am of the opinion that Article 4, Section 33 of the Nevada Constitution constitutes and insurmountable obstacle to Mello's claims. If the increase in compensation is not effective during a legislator's term of office, I fail to see how that legislator

can obtain vested rights to such compensation. The fact that the pension increase was enacted during Mello's term, does not preclude him from receiving the increased benefits. It is the vesting of the right during his term of office that is repugnant to the Nevada Constitution.

If Mello had retired after his term had expired, but before the statute was repealed, he undoubtedly would have acquired the rights he now claims. However, the pension increase was repealed prior to the end of his term. In my mind, the repeal precludes him from ever gaining vested rights to such benefits.

In Chamber of Commerce of East. U. Cty. v. Leone, 357 A.2d 311, (the New Jersey Supreme Court) considered a constitutional provision quite similar to the restriction in Nevada. In that decision, the Court held that if it

adopted the rational that the right to increased compensation was vested during a legislator's term, then the constitutional proscriptions precluding increases were applicable. Nevertheless, plaintiffs argue that the increased pension benefits do no constitute increased compensation within the meaning of Article 4 section 33 of the Nevada Constitution. The vast majority of cases hold that pension rights are compensation. Nevada decisions are in accord, Public Emp. Ret. v. Washoe County supra, City of Las Vegas v. Ackerman, 85 Nev. 493, 457 P.2d 525 (1969). Also, I agree with the defense argument that the Nevada Constitution must be interpreted with the changing times. In this day and age, a pension is a vital part of any employees compensation. The compensation provided by the Amendment to the legislator's Pension Act in 1989 not only

allowed increased monthly payments, it also provides for the purchase of service credits and early retirement. The sole purpose of such provisions is to increase the pecuniary benefits available to a legislator. I have concluded that all of the benefits contained in Section 11 through 15 inclusive of Chapter 481 Statutes of Nevada 1989, constitute "compensation" within the meaning of Article 4 Section 33 of the Nevada Constitution.

The Mellos also maintain that the constitutional provision is no applicable because legislative pensions are paid from the Legislative Fund rather than the State Treasury. A reading of NRS 218.2387 concerning the Legislative Fund and NRS 226.115 defining the State Treasury leaves no doubt that the Legislative Fund is funded by direct appropriations from the

State General Fund. In my opinion, it is unrealistic to argue that the monies used to pay benefits do not come from the public treasury. The fact that the Public Employees Retirement Board actually entered into written agreements with Mello for the purchase of service credits and the payment of benefits is not significant in my opinion. The statute in question was presumed to be constitutional until the same was repealed or declared unconstitutional. The Public Employees' Retirement System had no alternative but to follow the provisions of the new law. In a related argument, plaintiffs contend the Doctrine of Equitable Estoppel prevents the State from denying the validity of such contracts citing Nev. Pub. Emp. Ret. Bd. v. Byrne, 96 Nev. 276, 607 P.2d 1351 (1980). I disagree.

First, I concur with defense argument

that a court of equity has no authority to override a constitutional prohibition, Hedges v. Dickson County, 150 U.S. 182 (1893), Walker v. U.S. Depart. of Housing and Urban Dev., 912 F.2d 819 (5th Cir. 1990).

Second, the facts do not justify the application of the Doctrine of Equitable Estoppel. In Nev. Pub. Emp. Ret. BD. v. Byrne, supra, the board made a factual error in representing the amount an employee would receive as pension benefits. In this matter, the board made no such error. They were simply enforcing a statute passed by the legislature. I accept the Mellos' testimony that the senator's primary reason for retirement was based on personal considerations, however, I am of the opinion that the timing of his retirement was influenced by his fear of losing the increased benefits.

There was considerable pressure for repeal of the pension increase from both the media and the general public.

In July of 1989, Mello learned that Common Cause, through its executive director, Leola Armstrong, was circulating a petition for a referendum on the new pension law to be submitted to the voters at the November, 1990 General Election. Apparently, Common Cause was having considerable success in obtaining signatures.

In August of 1989, Will Keating and Don Mello had a conversation concerning the concept of "detrimental reliance". In my view, Mello was a sophisticated lawmaker who took the steps he felt necessary to preserve his benefits. This was his prerogative, but, he took a calculated risk in retiring. This is not a situation where a court should intervene

to correct an inequity.

I conclude that judgment should be entered in favor of the defendants and against the plaintiffs with costs of suit to the defendants. Defense counsel is directed to submit to the Court proposed Findings, Conclusions and Judgment consistent with this opinion and to serve the same on the opposing party in accordance with WDCR 9.

Dated this 18 day of August, 1992.

_____

WILLIAM N. FORMAN

SENIOR DISTRICT JUDGE

APPENDIX C

Case No. CV91-660

Dept. 8

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE
STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE
JUDGMENT

FILED 92 Oct 22 P2:22 Judy Bailey Clerk,
by M.Lopez

DONALD R. MELLO AND BARBARA MELLO,

Plaintiffs,

vs.

JOYCE L. WOODHOUSE, STEVE COZINE,
JOHN A. CASERTA, JULIUS CONIGLIARO,
and O.C. LEE as members of the
Public Employee's Retirement Board
of the State of Nevada, and
LEGISLATOR'S RETIREMENT SYSTEM,

Defendants.

This action came on for trial on June 15, 1992, before the court sitting without a jury, the honorable William N. Forman, Senior District Court Judge, presiding, and the issues having been duly tried, and

the Court having rendered its decision on August, 18, 1992, and the Court having made its Findings of Fact and Conclusions of Law filed on the 19th day of October, 1992, and the Decision, Findings and Conclusions are incorporated herein by this reference as though fully set forth; IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. That Plaintiffs take nothing in equity or in law from this action.

2. That no permanent injunction be entered against Defendants.

3. That Defendants did not impermissibly impair any contractual rights of Plaintiffs in violation of the United States Constitution.

4. That Plaintiffs' action is dismissed on the merits with prejudice.

5. That Plaintiffs bear the costs of suit consistent with the memorandum of

costs submitted by defendants to the court on October 9th 1992.

Dated this 19th day of October, 1992.

_____
William N. Forman
Senior District Court Judge

Submitted by:

FRANKIE SUE DEL PAPA
Attorney General

By:_____
Dana K. Sammons
Deputy Attorney General
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Attorneys for Defendants

Appendix D

Case No. CV(91-660)

Dept. No. 8

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE
STATE OF NEVADA
Filed 92 Oct 22 P2:22 Judy Bailey Clerk,
by M. Lopez
IN AND FOR THE COUNTY OF WASHOE

FINDINGS OF FACT, CONCLUSIONS OF LAW

DONALD R. MELLO AND
BARBARA MELLO,

Plaintiffs,
vs.

JOYCE WOODHOUSE, STEVE COZINE, JOHN A. CASERTA, JULIUS CONIGLIARO and O.C. LEE as members of the Public Employee's Retirement Board of the State of Nevada; WILL KEATING, as the Executive Officer of the Public Employee's Retirement Board of the State of Nevada, and LEGISLATOR'S RETIREMENT SYSTEM,

Defendants.

Trial in the above-entitled matter commenced on June 15, 1992, and concluded on June 22, 1992, coming before the court

without jury. James Shields Beasley appeared on behalf of the Plaintiffs, and Dana K. Sammons and P. Mark Ghan, Deputy Attorneys General, appeared for the Defendants. The Court, having heard and examined the evidence both oral and documentary, introduced by the parties, having heard, read and considered the arguments of counsel and their several briefs, and being fully advised in the premises, now makes the following Findings of Facts and Conclusions of Law.

FINDINGS OF FACT

1. Donald R. Mello was appointed by the Washoe County Commissioners in December of 1963 to fill a vacancy in the Nevada Assembly. As a member of the Nevada Assembly, Donald R. Mello was provided membership in the Retirement System. At the time of his appointment, his service credit for retirement purposes was deemed

to have begun on January 1, 1963.

2. From January 1963 to December 31, 1982, Donald R. Mello served continuously as a member of the Nevada State Assembly. Donald R. Mello was elected in November of 1982 to the Nevada State Senate, a term which he began serving on January 1, 1983. He served continuously in the Nevada State Senate from that date until the date of his retirement on September 30, 1989. For the majority of years in which Donald R. Mello served in the Nevada Legislature, there was no change in the law which provided for pension benefits to a legislative member upon his or her retirement.

3. During the 1989 legislative session, Assembly Bill 820 (AB 829) was introduced to amend the Public Employees Retirement System (PERS) and the Legislative Retirement System (LRS) (collectively the

"Retirement System"). On June 23, 1989, the Nevada Legislature, acting through its Legislative Branch, amended the Legislator's Retirement Law by its enactment of Section 11 through 15 inclusive of Chapter 481, Statutes of Nevada, 1989 (former AB 820).

4. Through the enactment of Sections 11 through 15 inclusive of Chapter 481, Statutes of Nevada, 1989, the Legislature made several substantial changes to the Legislators' Retirement Law. These changes included retirement at any age after 30 years of service, with no penalty for retirement under the age of 60, as well as the ability of a legislator to purchase up to 5 years additional service regardless of previous public service, and the new law gave the retiring legislator an assumed salary upon which to calculate the resulting pension benefit. (Emphasis

added.)

5. In July of 1989, Senator Mello learned that Common Cause, a citizen's action group, was circulating a petition for a referendum the new pension law to be submitted to the voters at the November 1990, General Election. Senator Mello was informed of this by Leola Armstrong, the executive director of Common Cause. Common Cause was having considerable success in acquiring signatures on this petition.

6. In August of 1989, Senator Mello contacted Will Keating the Executive Officer of the Retirement System and discussed with him the theory of "detrimental reliance" in connection with Senator Mello's contemplation of his own personal retirement.

7. During August, 1989, Senator Mello requested two retirement estimates

concerning his personal retirement. These formal estimates were prepared for him within two months of the end of the 1989 legislative session. The first was mailed to him on August 10, 1989. The conditions imposed on this retirement estimate by Senator Mello in order for the Legislative Retirement System to estimate a retirement benefit for him were: 1) an effective date of September 1, 1990 and 2) a purchase of service credit sufficient to bring Senator Mello's service credit to 30 years. The purchase of service credit would allow Senator Mello the opportunity to take advantage of the new provision passed by the 1989 Legislature that a legislator could retire at any age with 30 years of service. This estimate also related to Senator Mello his option of retiring without a purchase of service credit.

8. Senator Mello requested his second

retirement estimate on August 25, 1989. When Senator Mello contacted the Retirement System he requested this estimate with the following conditions: 1) The calculation of the benefit with a purchase of service credit to achieve total service credit of thirty (30) years, and 2) An earlier retirement date than that of his previous request, to wit: September 30, 1989. On September 1, 1989, Shirley Moell, Benefits Division Manager at the Retirement System, transmitted a benefit estimate and purchase of service agreement reflecting the necessary service credit of three year and three months to be purchased pursuant to NRS 218.2382(b) to be purchased by Senator Mello.

9. During the first week in September, Senator and Mrs. Mello applied for financing with a private bank to fund the purchase of service necessary to achieve

thirty years of service in the system for Senator Mello.

10. On September 19, 1989, Senator and Mrs. Mello made an offer to purchase a parcel of real property in Washoe Valley. At this time they sought to increase the financing request they had made earlier to finance the purchase of service credit to cover also the cost of the property they wished to purchase.

11. Senator Mello executed his purchase of service credit agreement for the purchase of 5 years in the Legislative Retirement System on September 27, 1989.

12. On September 27, 1989, Senator Mello sent his letter of resignation to then acting Governor Robert Miller with an effective date of midnight, September 30, 1989.

13. Senator Mello received his first

retirement check on October 1, 1989.

14. On November 16, 1989, the sale of the property in Washoe Valley to the Mellos closed escrow.

15. On November 21, 1989, the Nevada Legislature was convened by the governor in special session for the sole purpose of repealing certain provisions of Chapter 481 of the Sessions Laws of 1989 (AB 820) to wit: section 11 through 15 inclusive. In the repeal of these provisions, PERS, as the administrator of LRS, was directed to cancel all purchase of service agreements executed pursuant to the repealed provisions of Chapter 481, Statutes of Nevada and reduce any benefits to the level reflected in the law previously codified.

16. On November 22, 1989, Senator Mello was notified that PERS was cancelling his purchase of service agreement pursuant to

the mandate of the special session and the returning to him the amount tendered to the system for the purchase plus interest (total-$39,093.62). The notice also recalculated his benefit based upon his of less than 60, the assumed retirement age in the Legislative Retirement System, his monthly benefit would be reduced by 6% per year and .5% per month for the years and months Senator Mello was under the age of 60. His monthly benefit was determined to be $422.22.

17. If any of the above stated Findings of Fact are more appropriately deemed Conclusions of Law, they shall be considered as such.

Conclusions of Law

1. As a legislator who was sitting during the 1989 legislative session, Donald R. Mello was precluded from taking the benefits of Chapter 481, Statutes of

Nevada, 1989, prior to the natural expiration of his term, by virtue of Article 4 section 33 of the Nevada Constitution, which states in pertinent part:

The members of the Legislature shall receive for their services, a compensation to be fixed by law and paid for out of the state treasury, for not to exceed 60 days during any regular session of the legislature and not to exceed 20 days during any special session of the legislature convened by the governor; but no increase in compensation shall take effect during the term for which the member of either house shall have been elected. . . .

(Emphasis added).

2. The term "compensation" used in Article 4 section 33 of the Nevada Constitution encompasses legislative

pensions such as Donald R. Mello's pension from the Legislative Retirement System at issue in this matter. A pension is an integral part of compensation. City of Las Vegas v. Ackerman, 85 Nev. 493, 457 P.2d 525 (1969), Pub. Emp. Ret. Bd. v. Washoe County, 96 Nev. 718, 615 P. 2d 972 (1980).

3. Donald R. Mello's right to the increased pension benefits embodied in Chapter 481, Statutes of Nevada 1989, did not vest during his natural term of office which did not expire until January 1, 1991, due to the restraint of legislative power found in Article 4 Section 33 of the Nevada Constitution. Senator Mello could not take the benefit of the enhanced pension (compensation) during his term and thus such benefits could not vest during his term.

4. The pension given Donald R. Mello

from the Legislative Retirement System is drawn from the state treasury within the meaning of Article 4 Section 33 of the Nevada Constitution, as it is funded by direct appropriation from the state general fund to the legislative fund, which in turn pays all legislative compensation, including contributions into the Legislative Retirement System.

5. Each amendment to the Legislative Retirement System included in Chapter 481 Statutes of Nevada, 1989, constituted compensation within the meaning of Article 4 section 33 of the Nevada Constitution. Changes to service credit provisions, age provisions, and salary provisions of the Legislative Retirement System affect the ultimate benefit or "compensation" given a legislator and cannot be severed from the totality of that benefit, therefore changes to such components of the benefit

calculation cannot be considered separately for purposes of determining the applicability of the restraint of power in Article 4 section 33 of the Nevada Constitution.

6. Article 4 section 33 of the Nevada Constitution acts as a delay to the vesting for benefit enhancements to pensions for legislators to the date of the natural expiration of the legislator's term. Pension benefits for legislators are subject to the vesting rule of Pub. Emp. Ret. Bd. v. Washoe County, supra, but this rule of vesting must take into consideration the mandated restraint of power set forth in Article 4 section 33 of the Nevada Constitution.

7. Increases in compensation such as an increased pension benefit passed during a sitting legislator's term are not favored. To allow a sitting legislator to set his

own compensation is to give him an extraordinary power. Cannon v. Taylor, 87 Nev. 285, 486 P2d 493 (1972). The Nevada Constitution has placed a restraint on this authority by the language of Article 4 Section 33. To interpret this provision in any other manner, renders its proscription meaningless.

8. Chapter 1, Special Session of 1989, did not impermissibly impair any contractual right or obligation of Senator Mello or the State of Nevada, because Senator Mello had gained no right to the increased pension benefits contained in Chapter 481 Statutes of Nevada, 1989. Such right cannot arise until all conditions of entitlement have been satisfied. In this instance that includes the natural expiration of Senator Mello's term, to wit: January 1, 1991, the prohibition found in Article 4 section 33

would not have applied and Senator Mello could have retired with the enhanced benefit.

9. The case of Nev. Pub. Emp. Ret. Bd. v Byrne, 96 Nev. 276, 607 P.2d 1351 (1980) does not mandate the application of equitable principles in this instance. Brune provides for a court in equity to correct and inequity caused by the Retirement System's correction of it own mistake. In this matter, the Retirement System made no such ministerial error. The board was given specific mandates by the Nevada Legislature and was required to follow them.

10. Senator Mello was a sophisticated lawmaker who took the steps he felt necessary to take advantage of the newly passed amendments to the Legislative Retirement System. These steps constituted a calculated risk which

included the act of Senator Mello's retirement. A court should not intervene in a situation where such acts were designed to take advantage of an equitable principle. Calculated reliance is not detrimental reliance.

11. If any of the above stated Conclusions of Law are more appropriately deemed Findings of Fact, they shall be considered a such.

Dated this 19 day of October, 1992

William N. Forman

Senior District Court Judge

APPENDIX-E

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS

1. U. S. Constitution, Article 1, Section 10, cited at pages i, 42, 49.

Section 10. **Limitations on powers of the states.** No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold or silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, expost facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. (Emphasis added.)

2. U.S. Constitution, Fifth Amendment, cited at page viii.

Prosecution by presentment, indictment; double jeopardy; self-incrimination; due

process; property taken for public use. No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added.)

3. U. S. Constitution, Fourteenth Amendment, as cited at page viii.

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States and subject to the

jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

Section 4. **Validity of public debt.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void. (Emphasis added.)

Section 5. **Enforcement.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 28 USC 1257. See Jurisdiction statement pages viii.

Sec. 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title right, privilege, or immunity is specially set up

or claimed under the Constitution or the Treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.

5. 26 USC 401 (a)(3), IRC 1954. Statement pages 16, 17.

SEC.401. Qualified pension, profit-sharing, and stock bonus plans.

(a) Requirements For Qualification.--A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section--

(3) if the trust, or two or more trusts,

or trust or trusts and annuity plan or plans are designated by the employer as constituting parts of a plan intended to qualify under this subsection which benefits either--

(A) 70 percent or more of all employees, or 80 percent or more of all employees who are eligible to benefit under the plan if 70 percent or more of all the employees are eligible to benefit under the plan, excluding in each case employees who have been employed not more than a minimum period prescribed by the plan, not exceeding 5 years, employees whose customary employment is for not more than 20 hours in any one week, and employees whose customary employment is for not more than 5 months in any calendar year, or

(B) such employees as qualify under a classification set up by the employer and

found by the Secretary or his delegate not to be discriminatory in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees; and

(4). . .

6. **Employee Retirement Income Security Act, ERISA, PL 93-406 88STAT 901,** see 26 USC 401 et seq.

7. 26 USC 401. (as amended by ERISA) statement pages viii, 16, 49. SUBCHAPTER D--DEFERRED COMPENSATION, ETC. Part I--Pension, Profit-sharing, Stock Bonus Plans, ETC.

SEC. 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification.-- A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of and

employer for the exclusive benefit of his employees or otheir beneficiaries shall constitute a qualified trust under this section--

(3) if the plan of which such trust is a part satisfies the requirements of section 410 (relating to minimum participation standards); and . . .

8. 26 USC 410 (statement, page 22)

SEC. 410. Minimum participation standards

(a) Participation.--

(1) Minimum age and service conditions.--

(C) Hours of service.-- For purposes of this subsection the term "hour of service" means a time of service determined under regulations prescribed by the Secretary of Labor.

9. 26 USC 414(d), statement page 17.

10. 26 USC 415(b), statement pages 39, 41, 43, 45, 47.

Sec. 415. Limitations on benefits and contribution under qualified plans . . .

(b) Limitation for defined benefit plans.--

(1) In general.--Benefits with respect to a participant exceed the limitation of this subsection if, when expressed as an annual benefit (within the meaning of paragraph (2)), such annual benefit is greater than the lesser of

(A) $90,000, or

(B) 100 percent of the participant's average compensation for his high 3 years.

11. California Constitution Article IV section 4, statement page 28.

Sec. 4. Compensation of members; retirement benefits and allowances

Sec. 4. Compensation of members of the Legislature, and reimbursement for travel and living expenses in connection with

their official duties, shall be prescribed by statute passed by rollcall vote entered in the journal, two-thirds of the membership of each house concurring. Commencing with 1967, any statute enacted making an adjustment of the annual compensation of a member of the Legislature the adjustment may not exceed an amount equal to 5 percent for each calendar year following the operative date of the last adjustment, of the salary in effect when the statute is enacted. Any adjustment in the compensation may not apply until the commencement of the regular session commencing after the next general election following enactment of the statute.

The Legislature may not provide retirement benefits based on any portion of a monthly salary in excess of 500 dollars paid to any member of the

Legislature unless the member receives the greater amount while serving as a member in the Legislature. The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967.

When computing the retirement allowance of a member who serves in the Legislature during the term commencing in 1967 or later, allowance may be made for increases in the cost of living occurring after retirement of the member, except that the Legislature may provide that no member shall be deprived of a cost of living adjustment based on a monthly salary of 500 dollars which has accrued prior to the commencement of the 1967 Regular Session of the Legislature.

12. California Constitution Article V Section 12, formerly California

Constitution Article 5, section 19, statement page 21.

Sec. 19. Compensation of constitutional officers

Sec. 19. The Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General, and Surveyor General shall at stated time during their continuance in office, receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected, . . .

13. California Government Code 9360.9, cite as Cal.Gov.Code 9360.9, statement page 21.

Section 9360.9. Cost of living adjustments

Notwithstanding any other provisions of this chapter, the provisions of this section shall be applicable to all

allowances granted by this chapter commencing with each installment paid or payable on or after January 1, 1964, with respect to Members of the Senate or the Assembly not having service in such office during or after term commencing in 1967 and members who are elective officers of the state whose offices are provided by the Constitution and who were first elected to any such office prior to Janaury 1, 1966.

On or before Janaury 1, 1964, the board shall adjust the amount of the allowances payable during the 1964 calendar year to reflect any increase in cost of living occurring between the 1963 calendar year and the 1955 calendar year, inclusive, and any increase resulting from such adjustment shall be payable commencing with each installment of allowances paid or payable on or after January 1, 1964.

On or before January 15, 1965, and on or before January 15 of each year thereafter, the amount of the allowances provided by this chapter shall be adjusted by the board to reflect any increase in cost of living occurring after January 1, of the immediately preceeding calendar year. . . . The calendar year 1954 shall be used as the base year in computing any annual adjustment. The annual adjustment made on or before January 15, 1965, and made on or before January 15 each calendar year thereafter shall correspond to the average annual change in the calendar year immediately preceding the year during which the adjustment shall be effective. The adjustment made on or before January 1, 1964 shall correspond to the total of the average annual changes in each calendar year from the 1955 calendar year to the 1963 calendar year, inclusive.

The adjustment provided by this section shall be made only if it operates to effect an increase over the allowance payable for the calendar year immediately preceding.

14. AB 701, Chapter 711 1991, statement page 49.

Sec. 30. Chapter 218 of NRS is hereby amended by adding thereto the provisions set forth as sections 31 to 38, inclusive, of this act.

Sec. 31. Notwithstanding any other provision of law, every distribution to a member of the legislators' retirement system must be made pursuant to the provision of section 401(a)(9) of the Internal Revenue Code (26 U.S.C. Sec. 401 (a)(9)), as that section existed on the effective date of this act, that apply to governmental plans.

Sec. 32. Notwithstanding any other

provision of law, the amount of compensation used to determine the retirement benefit of a member of the legislators' retirement system must not exceed the limitations provided by section 401(a)(17) of the Internal Revenue Code (26 U.S.C. sec. 401(a)(17)), as that section existed on the effective date of this act.

Sec. 33. 1. The election provided by section 415(b)(10)(C) of the Internal Revenue Code (26 U.S.C. sec 415 (b)(10)(C)) is hereby made.

2. Notwithstanding any other provision of law, the benefits payable to and the contributions made by or for the benefit of a legislator whose effective date of membership is on or after January 1, 1990, are limited pursuant to the provisions of sections 415(b) and 415 (e) of the Internal Revenue Code (26 U.S.C. sections

415(b) and 415(e) of), as those sections existed on the effective date of this act. The provisions of section 415 (b)(2)(F) of the Internal Revenue Code (26 U.S.C. section 415 (b)(2)(F)) do not apply to the benefits of such a legislator.

Sec. 33. not applicable

Sec. 34. The benefits payable to a legislator whose effective date of membership is before January 1, 1990, must not be less than his accrued benefits determined without regard to any amendment of the legislators' retirement system made after October 14, 1987. (Emphasis added.)

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Supreme Court, U.S.
FILED
OCT 28 1994
OFFICE OF THE CLERK

No. 94-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD R. MELLO and
BARBARA J. MELLO,
Petitioners,

v.

JOYCE L. WOODHOUSE, et al.,
Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court should decline discretionary review of this matter because the Nevada Supreme Court based its decision on independent and adequate state grounds under the Nevada Constitution.

II. Whether the Court should decline discretionary review based upon federal question jurisdiction because the provisions of the Employment Retirement Income Security Act of 1974 (ERISA) relating to individual pension benefits for members of a pension plan do not apply to the Public Employees Retirement System of Nevada (PERSN) or the Legislative Retirement System (LRS) by virtue of the exemption to ERISA for public pensions systems found at 29 U.S.C. 1003(b)(3)(1985).

III. Whether the Court should decline review for procedural due process violations on the basis that Petitioners are due only

the actual legislative process as procedural due process prior to the enactment of legislation.

LIST OF PARTIES

Petitioners in this matter were the Appellants in the Nevada Supreme Court. They are Donald R. Mello and Barbara J. Mello.

Respondents in this matter were respondents in the Nevada Supreme Court. They are: Joyce L. Woodhouse, Steve Cozine, John A. Caserta, Julius Conigliaro, and O.C. Lee as members of the Public Employees Retirement Board of the State of Nevada; Will Keating, as Executive Officer of the Public Employees Retirement System of the State of Nevada, and the Legislators' Retirement System.

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OPINIONS AND JUDGMENTS BELOW

The Petitioners, Donald and Barbara Mello purport to raise five (5) issues to this Court for review. See Mello, et ux. v. Woodhouse, et al., Case No. 94-573, Petition for Writ of Certiorari. (Petition). Review is sought of the published opinion of the Nevada Supreme Court filed April 6, 1994. (Petitioner's Appendix, A-1). The state district court's unpublished decision which preceded the appeal to the Nevada Supreme Court was filed on August 8, 1992. Appendix B to Petition. The state district court, subsequent to the rendering of its decision rendered findings of fact and conclusions of law and judgment filed on October 22, 1992. Appendices C, D and E.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked by the subject certiorari petition pursuant to 28 U.S.C.A. § 1257 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const. art. I, § 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in the Payment of Debts; pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without Consent of the Congress, lay any Impost or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep troops, or Ships of War in time of Peace, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

B. Nev. Const. art. 4, § 33.

The members of the Legislature shall receive for their services, a compensation to be fixed by law and paid out of the public treasury, for not to exceed 60 days during any regular session of the legislature and not to exceed 20 days during any special session convened by the governor; but no increase of such compensation shall take effect during the term for which the members of either house shall have been elected Provided, that an appropriation may be made for the payment of such actual expenses as members of the Legislature may incur for postage, express charges, newspapers and stationery not

exceeding the sum of Sixty dollars for any general or special session to each member; and Furthermore Provided, that the Speaker of the Assembly, and Lieutenant Governor, as President of the Senate, shall each, during the time of their actual attendance as such presiding officers receive and additional allowance of two dollars per diem.

C. 29 U.S.C. § 1003 (1985).

Sec. 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained--

(1) by any employer engaged in commerce or any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if--

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

D. Sup. Ct. R. 17.

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeal has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in

conflict with the decision of another state court of last resort or a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this court.

STATEMENT OF THE CASE

Former State Senator Donald Mello and his wife Barbara Mello filed this matter in Nevada district court in January 1991. The case came to trial on June 15, 1992, and concluded on June 22, 1992. The matter was

heard by the district court without jury. The decision by the district court was premised upon the Nevada Constitution. The Honorable Judge William Forman determined that a pension is a part of compensation for a legislator and as such subject to the state constitutional limitation on the taking of increases in compensation passed during a legislator's natural term of office. In essence, a pension contract purporting to increase legislative compensation could not be created until the sitting legislator's natural term expired. The court delayed vesting in an increased legislative retirement until after that date. This delay in vesting gave effect to the proscription in the Nevada Constitution against the taking of increased pensions as part of compensation to the legislator passed while the legislator was fulfilling his term of office.

The case was appealed to the Nevada Supreme Court. In the April 6, 1994, opinion the court determined that the pension benefit given Senator Mello was given in contravention of the Nevada Constitution and therefore was not subject to vesting at the time received (illegal contract). Vesting would have occurred after the natural expiration of the Senator's term, and by then the repeal of the higher pension benefit was complete.

STATEMENT OF THE FACTS

This matter arises due to the passage of Assembly Bill 820 of the 1989 session of the Nevada Legislature. See Petitioner's Petition, 3--8. This bill was a comprehensive pension act providing amendments to both the regular Public Employees Retirement Fund (NRS 286.010 et seq.) and the Legislators Retirement Fund (NRS 218.2371 et seq.). Sections 11 through 15 of the bill addressed changes in the

Legislators' Retirement System, including an approximately 300 percent increase in the benefits to legislators. AB 820 passed out of the Legislature and to the Governor who vetoed the bill. The bill was returned to the Legislature and both houses voted to override the veto the same day. On June 23, 1989, AB 820 became law in Nevada. Senator Mello took advantage of the provisions affecting the Legislators' Retirement System and retired at midnight on September 30, 1989. His natural term of office would not expire until almost eighteen (18) months later.

On November 21, 1989, the Legislature convened in Special Session at the call of the Governor for the sole purpose of repealing sections 11 through 15 of AB 820, the legislative pension provisions of the bill. Chapter 1 Special Session 1989 repealed the enhanced pension benefits and returned the benefit level to the level

prior to the 1989 regular legislative session. The bill also required the Public Employees Retirement System, as administrators of the Legislators' Retirement System, to cancel any and all purchase of service credit agreements and to return any funds received for the purchase of service. On November 22, 1989, the Executive Officer of the Public Employees Retirement System sent a certified letter to former Senator Mello addressing the mandates of the Special Session and returning to him the amount tendered to the Retirement System for the purchase of service credit plus interest. This lawsuit ensued.

SUMMARY OF THE ARGUMENT

There are several reasons why this Court should decline review of this matter given the discretionary nature of the review in certiorari. First, this case was decided by the Nevada Supreme Court upon independent

and adequate state grounds. The overriding determination of the Nevada Supreme Court rested upon the interpretation of a provision of the state constitution governing when and how much compensation a legislator in Nevada should receive. Nev. Const. art. 4, § 33.

Second, former Senator Mello and his wife apparently assign factual and legal error to the Nevada Supreme Court in upholding the state district court decision in this matter. The errors assigned focus primarily upon the Nevada Supreme Court's interpretation of Nevada Constitutional law and the law of equity as applied by the Nevada courts. Such interpretations are not reviewable by this Court unless in conflict with the Federal Constitution or preempted by federal statute. Neither of these types of errors are present in this case.

Third, Petitioners allege violations of the Employment Retirement Income Security

Act of 1974 (ERISA) as a question of federal law, allegedly interpreted incorrectly by the Nevada Supreme Court. The provisions governing benefits to individuals under the Legislators' Retirement System are not governed by ERISA. 29 U.S.C. 1003(b)(1)(1985). The provisions of ERISA applicable to the Legislative Retirement System relate only to plan qualification, and the record in this matter does not address the issue of plan qualification. See generally, 26 U.S.C. § 401 (1986), et seq. and 26 U.S.C. § 415 (1986), et seq. This matter rests solely on the entitlement or lack of entitlement to modified pension benefits by an individual in a public pension plan. Plan status as qualified or not does not affect the rights of the individual members of the public pension plan. The remedy when a public pension plan is disqualified under ERISA is for the plan to lose its tax exempt status with the Internal Revenue Service.

The remedy sought by the Petitioners in this matter cannot be achieved through an invocation of the plan qualification provisions of ERISA. This argument is without foundation or merit and rests upon false assumptions concerning the applicability of federal law.

Fourth, Petitioners allege a violation of their due process rights committed by the Nevada Legislature when the legislature refused to allow testimony at the Special Session of 1989. Such acts cannot be attributed to the Public Employees Retirement System or to the Legislators' Retirement System. The Legislature of the State of Nevada is not a party to this suit, nor has it ever been a defendant in this matter. Additionally, the only process due the Petitioners in the passage of legislation is what the legislature gives.

Finally, Petitioners seek to increase the record in this matter by setting forth facts

in their petition which are not a part of the record below. This court reviews questions of law and should not be called upon to review newly alleged evidence.

ARGUMENT

A. IT IS WELL ACCEPTED THAT THIS COURT WILL NOT REVIEW A DECISION OF A STATE COURT RESTING UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

The Nevada Supreme Court, in making its determination in this matter, concluded that Senator Mello's alleged contract for pension benefits was specifically limited by Nevada law. Article 4 section 33 of the Nevada Constitution prevents a legislator from taking an increase in compensation passed during his term of office, therefor any contract purporting to increase those benefits in violation of the Nevada State Constitution is void as against state law and should not be given protection of the United States Constitution under Article I section 10 (contracts clause).

Pensions are a part of compensation under Nevada law. City of Las Vegas v. Ackerman, 85 Nev. 493, 457 P.2d 525 (1969). The Nevada Supreme Court determined in this matter that the constitutional prohibition only may be given meaning in the pension context if the prohibition remained in effect even when a legislator's term is cut short by resignation and/or retirement. The prohibition acts as a delay to vesting until the end of the legislators' natural term of office. Based upon this state constitutional prohibition, the Nevada Supreme Court determined that Senator Mello's pension contract was not and could not be impaired because it could not be created until his natural term of office expired. By the time his natural term of office expired (January 1991), the Nevada Legislature repealed the increased pension for legislators. That which is not an enforceable contract right is not an

obligation which can be impaired with in the meaning of the Contracts Clause. Morton v. Dardanelle Special School District, 121 F.2d 423 (8th Cir. 1941), cert. denied, 314 U.S. 655, reh'g denied, 314 U.S. 713 (1941).

No enforceable contract with Senator Mello existed at the time of the repeal of the provisions of AB 820 affecting legislators' pensions.

B. THE SUPREME COURT IS NOT A COURT OF GENERAL JURISDICTION WHICH CAN CORRECT ALLEGED ERRORS IN STATE COURT PROCEEDINGS.

The Petitioners assign many errors to the Nevada Supreme Court's decision in this matter, several of which are factual in nature or are matters of interpretation of state law. Error is assigned to the reliance by the Supreme Court on the facts surrounding the Common Cause Petition drive because Petitioners believe the referendum was illegal. Whether the petition was meritorious or not has no effect on the

present case. This Court does not review, but accepts as conclusive the findings of facts made by the state court. Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 97 (1909).

Additionally, Petitioners give great weight to the California case of Legislature of the State of California v. Eu, 286 Cal. Rptr. 283 (Cal. 1991). This case is a state court case involving principles of state law and California constitutional law. As such this court may not sit in review of a Nevada Supreme Court case on the basis of what was done in a neighboring state with respect to that state's laws. This is precisely what Petitioners would have this Court do.

Additionally, Petitioners assign error to the Nevada Supreme Court's decision on the basis that "The claim that Mello cannot receive his benefits because of article 4 section 33 of the Nevada Constitution has arisen this one time only because of

politics, and for no other reason." Petition at page 45. Nothing in the record below supports any political motivations of the Nevada Supreme Court or the district court in determining this benefit was not an enforceable contract. In fact, Petitioners' argument based upon alleged facts surrounding judicial retirement is not properly before this court, because those arguments and facts were excluded by protective order of the district court during trial.

Rather, the issue of interpretation of article 4 section 33 has never come to the courts of Nevada in any prior action. The Nevada court is consistent in its enforcement of limitations on the taking of increases in compensation passed during a term of office of a sitting public official. To allow a public official to set his own compensation is to give him an extraordinary

power. Cannon v. Taylor, 87 Nev. 285, 486 P.2d 493 (1972).

C. PETITIONERS' RELIANCE ON THE PROVISIONS OF ERISA IS ERRONEOUS.

Petitioners charge that the repeal of the Legislators' provisions of AB 820 violates ERISA for several reasons including technical compliance with provisions of the federal act governing private pension plans (See Petition at 16-23 and 29-31 for reference to various provisions of ERISA including retroactive amendment, hours of service, notice to and approval by the Secretary of Labor for plan changes, vesting, funding, minimum participation standards, forfeiture, etc.). The Legislators' Retirement System of the State of Nevada is expressly exempt from the benefit provisions of ERISA by virtue of 29 U.S.C 1003(b)(3)(1985).

D. THE LEGISLATIVE PROCESS ITSELF IS ALL THAT IS DUE INDIVIDUALS IN THE

PASSAGE OF LAWS BY A STATE LEGISLATURE.

The Petitioners in this matter assign error to the Nevada Supreme Court due to that court's failure to address the federal procedural due process violations alleged. Petitioners allege a violation of the 14th Amendment to the United States Constitution because they were not permitted to address the Legislature at the 1989 Special Session in 1989 when sections 11 through 15 of AB 820 were repealed. A federal question is not substantial if it is plainly without foundation or merit. Ennis Waterworks v. Ennis, 233 U.S. 652, 656 (1914). Neither is a federal question substantial when it rests upon false assumptions. Parker v McLain, 237 U.S. 469 (1915). When government, through the legislature, passes legislation which affects a general class of persons, those persons have all received procedural due process --- the legislative process. The laws themselves must then be

challenged upon their validity under the Constitution. In this case, Petitioners have attacked the validity of the repeal on substantive constitutional grounds: the Contracts Clause. Such substantive attack on the repeal of AB 820 must fail because, as previously discussed, no protectable contract interest existed in the Mellos' at the time of the repeal due to the limitation on compensation found in the Nevada Constitution.

CONCLUSION

Respondents respectfully request that this Honorable Court deny the certiorari petition of Donald R. and Barbara J. Mello.

DATED: October 21, 1994.

Respectfully submitted.

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Supreme Court, U.S.
FILED
NOV 3 1994
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(3)

No. 94-573

In The
Supreme Court of the United States

October Term, 1994

DONALD R. MELLO, and
BARBARA J. MELLO, *Petitioners,*

vs.

JOYCE L. WOODHOUSE,et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI

PETITIONERS' REPLY BRIEF

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LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Supreme Court of the State of Nevada. The petitioners in this Court are italicized, all others are respondents.

Plaintiffs-Appellants: DONALD R. MELLO and BARBARA J. MELLO

Defendants-Appelees: Joyce L. Woodhouse, Steve Cozine, John A. Caserta, Julius Conigliaro, and O.C. Lee as members of the Public Employees Retirement Board of the State of Nevada; Will Keating, as Executive Officer of the Public Employees Retirement System of the State of Nevada, and the Legislators' Retirement System.

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In the argument section of its opposing brief to case no. 94-573, Petition for Writ of Certiorari by Donald R. and Barbara J. Mello, the state of Nevada claims that "it is well accepted that this court will not review a decision of a state court resting upon independent and adequate state grounds."

However, in Waters-Pierce Oil Co v. Texas No. 1, 212 U.S. 97 (1908), this Court stated, "The jurisdiction of this court to review the proceeding of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the

state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court." (Emphasis added.) Quimby v. Boyd, 128 U.S. 488; Egan v. Hart, 165 U.S. 188; Dower V. Richards, 151 U.S. 658. What is more an issue for this court to decide than a pension case that is required to abide by federal law and regulation, yet doesn't, thereby causing a grievous breach of contract violating Art. I Sec. 10 of the U. S. Constitution.

The matter before this Court is breach of a retirement contract between Donald R. and Barbara J. Mello and the

state of Nevada which caused the forfeiture and reduction of retirement pension benefits.

This has resulted in former Senator Mello receiving a greatly reduced benefit, with penalties, for which he has neither applied or agreed.

And these are federal issues as declared by this Court in Alessi v. Raybestos-Manhattan, Inc., 451 US 504, 68 L.Ed.2d 402, 101 S.Ct.1895; "Congress having established pension plan regulation as exclusively a federal concern and, . . . pension terms themselves becoming expressions of federal law requiring preemption of intrusive state law." (Emphasis added.)

Therefore Nevada law can only dictate when former Senator Mello can begin collecting the increased benefits in which he vested upon his retirement. And

that would be January 1, 1991, the natural expiration of his term of office, unless this Court decrees that like other legislators, as detailed in the Petition, Mello's term of office ended when he retired and the Washoe County Commissioners appointed Peggy O'Neil to replace him for the November 21,1989, special session of the Legislature. Nothing in the Nevada Constitution says the legislature cannot increase their benefits, only they can't receive them during the term of office when they were increased. Nev. Const. art. 4, sec. 33.

The state of Nevada in its opposing brief again makes reference to the incorrect portion of ERISA and the U.S. Code that govern state and local government pensions. Title II of ERISA and subsequent federal laws amending ERISA and 26 USC are the areas of federal law and reg-

ulation that govern the Legislative Retirement System (LRS) and state of Nevada Public Employees Retirement System (NPERS).

These are the federal laws where Congress continues to extend the time allowing state and local governments to bring their pension plans into compliance with federal law, and the reason Congress has authorized the Internal Revenue Service to formulate model amendments within the Code of Federal Regulations for state and local government pension systems to adopt; the Model IID amendments (see 26 CFR Ch I (4-1-94 Edition) that would prevent the breach of contract normally protected by 26 USC 411(d)(6) and allow retroactive amendments to these plans; yet the Legislature of the state of Nevada never knew of these model amendments and therefore never passed any of the four

when they illegally repealed the increased benefits granted to legislators.

Congress also allowed state and local governments to adopt a "grandfather" clause to protect the benefits of those who had retired or earned benefits in excess of the limits set by 26 USC 415. Nevada adopted this grandfather clause July 5, 1991, making it retroactive to January 1, 1991; 15 months after the retirement of state Senator Donald Mello, thereby protecting the excess benefits of his pension. At no time prior to requesting the legislation to adopt this "grandfather" clause did Wilbur Keating, Executive Officer of NPERS inform the legislature of the need to adopt a protective clause, the existence of the limits on pension benefits, or the provisions available to protect the benefits earned by any Nevada public employee. At

no time did Keating inform the legislature of the provision allowing the establishing of an "optional form of benefit" plan that would avoid breaching the retirement contracts of vested legislators.

In Nachman Corp. v. Pension Benefit Guar. Corp., 446 US 359, this Court upheld the ERISA definition of a "nonforfeitable benefit" as follows: "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participants service, which is unconditional, and which is legally enforceable against the plan." (Emphasis added.)

Also in Nachman, supra, this Court "relies on the fact that the terms 'nonforfeitable' and 'vested' were often

used interchangeably in the legislative materials. This usage is said to be significant because in the pension field a benefit is usually said to 'vest' when a pension plan participant has fulfilled all the specified conditions for eligibility, such as age and length of service." (Emphasis added.)

Therefore, Senator Mello's benefits had 'vested' upon his retirement because he met all the specified conditions needed at that time to be eligible for his pension.

In Pratt v. Petroleum Prod. Mngmt Employee Sav. Plan, 920 F.2d 65 (10th Cir. 1990) the district court determined that the plan was liable on two independent grounds: reduction of an accrued benefit under ERISA and breach of contract. "We [U.S. Court of Appeals 10th Circuit] agree with the district court."

The Appeals Court goes on to say a "pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite years." (Emphasis added.) Hurd v. Illinois Bell Tel. Co., 234 F.2d 1, 942 (7th Cir.) cert. denied, 352 US 918, 77 S.Ct. 216, 1 L.Ed.2d 124 (1956) accord Hoefel v. Atlas Tack Corp., 581 F.2d, 4-5 (1st Cir.1978), cert denied, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed. 2d 462 (1979).

In Pratt, supra, the Court continued, "The fiduciaries are required to administer the plan "solely in the interest of the participants and beneficiaries." This was clearly not done by either Will Keating or the Members of the NPERS Board as evidenced by their lack of informing the legislature, all of whom

are required by law to be members of LRS, of the need to comply with federal law.

As the Court continued with Pratt, supra, "When plaintiff was terminated, defendant was required to determine benefits in accordance with the plan then in effect." (Emphasis added.) See Brug v. Pension Plan, 669 F.2d 570, 575-76 (9th Cir.), cert denied, 459 US 861, 10 S.Ct. 135, 74 L.Ed. 2d 116 (1982); Danti v. Lewis, 312 F.2d 345, 349 (D.C. Cir. 1962); Plaxall, 541 F.Supp. at 1391; Denzer, 474 F.Supp. at 391; Denzer, 474 F.Supp. at 766. "Subsequent unilateral adoption of an amendment which is then used to defeat or diminish the plaintiffs fully vested rights under the governing plan document is not only ineffective but also arbitrary and capricious. (Emphasis added.) See Brug, 669 F.2d at 574-76; Danti, 312 F.2d at 348-49; Denzer, 474

F.Supp. at 766.

In Weil v. Retirement Plan Administrative Committee, 913 F.2d 1045 (2nd Cir.1990) regarding who in the federal government was responsible for overseeing pension plans, the court stated, "We accord 'great weight' to these regulations and rulings since the IRS [Internal Revenue Service] is the agency responsible for administrating the partial termination statute." Amato v. Western Union Int'l Inc., 773 F.2d 1402, 1415 (2d Cir.1985), Cert. dismissed, 474 US 1113, 106 S.Ct. 1167, 89 L.Ed. 2d 288 (1986); Weil I, 750 F.2d at 12.

Although the Nevada LRS was not partially terminated, the retroactive amendment of the 1989 Special Session of the Legislature resulted in breach of Mello's retirement contract, <u>after he retired and began receiving benefits,</u> and forced him,

without choice, as allowed by IRC 1.411(a)-8T, to accept benefits under the previous schedule, which resulted in his receiving a 28.5 percent reduction in those old benefits because of his age of 55 years at the time of retirement.

Since the passage of ERISA and the amendments to 26 USC 401 et seq. the Internal Revenue Service has promulgated many regulations that apply to pension plans. These include 1,411(d)-4,(2) Section 411(d)(6) protected benefits that may be eliminated or reduced.[1] This reg-

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[1](i) Change in statutory requirement. A plan may be amended to eliminate or reduce a section 411(d)(6) protected benefit if the following three requirements are met: the amendment constitutes timely compliance with a change in law affecting plan qualifications; there is an exercise of section 7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans. In gener-

ulation became effective January 30, 1986, and the 1987 and 1989 sessions of the Legislature were never informed.

The Retirement Equity Act of 1984 (P.L. 98-397) clarifies the scope of the prohibition against decreases in the accrued benefit of a participant. The Act prohibits the elimination or reduction of an early retirement benefit by a plan amendment that changes the basis for determining actuarial equivalency with respect to previously accrued benefits except as to amendments approved by the Secretary of the Treasury. However, the elimination or reduction of a retirement

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limination or reduction of a
11(d)(6) protected benefit
be treated as necessary if
sible through other modifi-
o the plan (e.g. by expand-
vailability of an optional
enefit to additional employ-
atisfy the applicable quali-
requirement. (Emphasis

type subsidy is only prohibited with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. Senator Mello satisfied all requirements of the LRS, including the early retirement benefit, with no penalties, prior to his retirement and prior to the repeal of the early retirement benefit. (Emphasis added.)

According to IRS regulation 1.411(d)-4, "Q&A-6, a plan may not be amended to eliminate or reduce a protected benefit that has already accrued, even if the elimination or reduction is contingent upon the employee's consent. Senator Mello never consented to the elimination or reduction in his benefits, was never asked, and his legal representative was not allowed to address either house of the legislature. In Costantino

v. TRW, Inc., 773 F.Supp. 34 (N.D. Ohio 1991), "It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to this Court with a presumption of constitutionality, and that the burden is on one complaining that the legislature has acted in an arbitrary and irrational way." 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601.

Regulation 1.411(d)-4, (4-1-94 edition) Q-2: "To what extent may section 411(d)(6) protected benefits under a plan be reduced or eliminated?" A-2: (a) "Reduction or elimination of section 411(d)(6) protected benefits--(1) In general. A plan may not be amended to eliminate or reduce a section 411(d)(6) protected benefit that has already accrued, except as provided in section 412(c)(8) and 4281, and in paragraph (b) of this

Q&A-2. This is generally the case even if such elimination or reduction is contingent upon the employee's consent." (Emphasis added.) See footnote 1 and above.

IRS regulation 1.401(a)-11(b) Definitions.(4) "Qualified early retirement age. The term "qualified early retirement age" means the latest of -- (i) The earliest date, under the plan, on which the participant could elect (without regard to any requirement that approval of early retirement be obtained) to receive retirement benefits (other than disability benefits)." The LRS specified no age requirement for early retirement, only the completion of 30 years of service, of which up to five years could purchased. Senator Mello elected to purchase 3 years 3 months of service time which gave him the required 30 years.

IRS regulation 1.411(d)-4 Section 411(d)(6) protected benefits. Q-1: "What are 'section 411(d)(6) protected benefits'? A-1: "(a) In general. The term 'section 411(d)(6) protected benefit' includes any benefit that is described in one or more of the following categories--(2) Early retirement benefits and retirement type subsidies described in section 411(d)(6)(B)(i), including qualified social security supplements ad defined in sec. 1.401(a)-12."

Senator Mello met all the requirements in the LRS plan at the time of his resignation and retirement midnight September 30, 1989. It was after that date, November 21,1989, that the Legislature in Special Session met to repeal the LRS benefits it had increased by overriding the Governor's veto June 23, 1989.

The Attorney General of Nevada

claims that the repeal was not done for political reasons. Then why did her deputy have entered into the court record copies of stories from the Nevada Gazette-Journal and Sparks Tribune which demonstrated the highly political nature of the LRS benefit increase? Why did she, the Washo district court, and Nevada Supreme Court make such an issue of the petition that Common Cause threatened to circulate if the increases had not been repealed, if this was not a political issue?

APOLOGY

Our sincere apologies to this Honorable Court for including information in our petition that was not part of the record. We are aware Washoe District Court judge granted the state's request for a protective order to prevent the Court Administrator from testifying as to

pensions for individual judges. But we understood that the judge allowed our attorney to enter into the record the information about various judges that we had gleaned from public record.

CONCLUSION

Petitioners respectfully request that this Honorable Court approve the Petition for a Writ of Certiorari as submitted.

Dated: November 2, 1994.

Respectfully submitted,

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